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In The

Supreme Court of the United States

HOLMES FOSTER, in his official capacity as Superintendent of Banking and Administrator of Electronic Transfer of Funds, Iowa Division of Banking, Iowa Department of Commerce,

Petitioner,

v.

BANK ONE, UTAH, NATIONAL ASSOCIATION and COMPTROLLER OF THE CURRENCY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Federalism has historically reserved consumer protection for the States. Did the Eighth Circuit err by finding an implicit exception from state consumer protection laws for the automated teller machines (ATMs) of national banks when the federal Electronic Funds Transfer Act expressly subjects all ATMs of a "financial institution" to state consumer protection laws and defines "financial institution" to include national banks?

PARTIES

The caption contains the names of all parties in the appeal before the Eighth Circuit. Petitioner Holmes Foster is the Iowa Superintendent of Banking and the Administrator of Iowa's Electronic Transfer of Funds Act, Iowa Code ch. 527 (1997). The Petitioner has no parent or subsidiary companies to be listed.

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PETITION FOR A WRIT OF CERTIORARI

Holmes Foster, Administrator of the Iowa Electronic Transfer of Funds Act (hereinafter Iowa's EFT law) respectfully petitions for a Writ of Certiorari to review the judgment of the Eighth Circuit Court of Appeals. Michael K. Guttau, the original defendant, resigned as Administrator on November 12, 1999, and was succeeded by Mr. Foster on November 15, 1999. As a public officeholder, Mr. Foster (hereinafter Iowa's EFT Administrator) should be automatically substituted for Mr. Guttau. Fed. R. Civ. P. 25(d); Fed. R. App. P. 43(c); Sup. Ct. R. 35(3). Notice has been given to the federal courts below and an appropriate substitution order has been requested.

LOWER COURT DECISIONS

The United States District Court for the Southern District of Iowa denied preliminary injunctive relief against Iowa's EFT Administrator. The opinion is unreported. (App. Exh. B.) In a split decision, a three-judge panel for the Eighth Circuit *sua sponte* granted permanent injunctive relief against Iowa's EFT Administrator, prohibiting enforcement of specific provisions of Iowa's EFT law. (App. Exh. A.) The opinion is reported at 190 F.3d 844 (8th Cir. 1999). Rehearing and rehearing en banc were requested, but denied in a split decision. (App. Exh. C.)

JURISDICTION

The Eighth Circuit entered its judgment on September 2, 1999. Rehearing was denied on November 5, 1999. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. United States Constitution, Article VI (Supremacy Clause):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

II. 15 U.S.C. § 1693 (Electronic Funds Transfer Act):

> (a) The Congress finds that the use of electronic systems to transfer funds provides the potential for substantial benefits to consumers. However, due to the unique characteristics of such systems, the application of existing consumer protection legislation is unclear, leaving the rights and liabilities of consumers, financial institutions, and intermediaries in electronic funds transfers undefined.
>
> (b) It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The

primary objective of this subchapter, however, is the provision of individual consumer rights.

III. 15 U.S.C. § 1693a (Electronic Funds Transfer Act):

As used in this subchapter –

. . . .

(6) the term "electronic fund transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, direct deposits or withdrawals of funds, and transfers initiated by telephone. Such term does not include-

(A) any check guarantee or authorization service which does not directly result in a debit or credit to a consumer's account;

(B) any transfer of funds, other than those processed by automated clearinghouse, made by a financial institution on behalf of a consumer by means of a service that transfers funds held at either Federal Reserve banks or other depository institutions and which is not designed primarily to transfer funds on behalf of a consumer;

(C) any transaction the primary purpose of which is the purchase or sale of securities or commodities through a broker-dealer registered with or regulated by the Securities and Exchange Commission;

(D) any automatic transfer from a savings account to a demand deposit account pursuant to an agreement between a consumer and a financial institution for the purpose of covering an overdraft or maintaining an agreed upon minimum balance in the consumer's demand deposit account; or

(E) any transfer of funds which is initiated by a telephone conversation between a consumer and an officer or employee of a financial institution which is not pursuant to a prearranged plan and under which periodic or recurring transfers are not contemplated; as determined under regulations of the Board.

(7) the term "electronic terminal" means an electronic device, other than a telephone operated by a consumer, through which a consumer may initiate an electronic fund transfer. Such term includes, but is not limited to, point-of-sale terminals, automated teller machines, and cash dispensing machines;

(8) the term "financial institution" means a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person who, directly or indirectly, holds an account belonging to a consumer. . . .

IV. 15 U.S.C. § 1693q (Electronic Funds Transfer Act):

A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter. The [Federal Reserve] Board shall, upon its own motion or upon the request of any financial institution,

State, or other interested party, submitted in accordance with procedures prescribed in regulations of the Board, determine whether a State requirement is inconsistent or affords greater protection.

V. 12 U.S.C. § 24 (National Bank Act):

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have the power –

. . . .

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes. . . .

VI. 12 U.S.C. § 36(j) (National Bank Act):

The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent. The term "branch", as

used in this section, does not include an automated teller machine or a remote service unit.

VII. Iowa Code ch. 527 (1997) (Iowa Electronic Transfer of Funds Act):

App. Exh. D at 78-108.

STATEMENT OF THE CASE

The state statutes at issue in this case constitute part of a 1976 Iowa law designed to protect individual consumers who participate in electronic fund transfers. All financial institutions, state and federal, complied with this law until Bank One expanded its ATM operations into Iowa in 1997.

Iowa's EFT law was enacted to guard against the disclosure of personal financial information and to prevent systems from impairing the safety of cardholders' funds. Iowa Code § 527.1. (App. Exh. D at 78-79.) Among other things, every financial institution with an ATM (*1*) may not restrict its use to select cardholders, a requirement designed to ensure universal, nondiscriminatory access for all cardholders in this rural state; (2) must route transactions in a specified manner, a requirement designed to protect the privacy of financial information; (3) must disclose to cardholders how it can be reached in the event of ATM failure or malfunction; (*4*) must establish an office in Iowa or secure an agreement with a financial institution having an office for the timely processing of grievances when ATMs fail or malfunction; (5) must file informational statements that indicate its

compliance with the above requirements; and (6) may not levy a surcharge against any cardholder simply for using its ATM. Iowa Code §§ 527.4, 527.5. (App. Exh. D at 95-109.) *See* Iowa Code § 524.1204 (all privileges extended to state banks by Iowa's EFT law "shall be available on the same conditions to national banks").

In 1997, Bank One – with neither office, branch nor agreement with a financial institution having an office in Iowa – installed and operated ATMs in Sears, Roebuck & Co. stores throughout Iowa. (App. Exh. B at 18.) Eventually, Bank One disabled its ATMs and sought preliminary injunctive relief in federal court against Iowa's EFT Administrator on the ground that federal law preempted certain provisions of Iowa's EFT law. (App. Exh. B at 19-20.) Iowa's EFT Administrator defended Iowa's EFT law on the basis of the anti-preemption provision of the federal Electronic Funds Transfer Act (EFTA), which states:

> This subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, except to the extent that state laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.

15 U.S.C. § 1693q. Later, the Office of the Comptroller of the Currency (hereinafter the OCC) intervened.

In denying any relief, the District Court found no preemption of Iowa's EFT law. (App. Exh. B at 54-55, 75.) On appeal, Bank One only argued that preemption

applied to three requirements of Iowa's EFT law: establishing a formal contact in Iowa for resolution of grievances, filing an informational statement before establishing an ATM, and limiting advertising of specific financial institutions on off-premise ATMs. *See* Iowa Code §§ 527.4, 527.5. (App. Exh. D at 95-109.) Judges Richard S. Arnold and Roger L. Wollman reversed the District Court and *sua sponte* ordered entry of a permanent injunction. (App. Exh. A at 2.) The majority carved out of the EFTA an exception for national bank ATMs, even though the EFTA expressly applies to national bank ATMs. 15 U.S.C. § 1693a(7), (8). "[The EFTA anti-preemption provision] is specifically limited to the provisions of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks." (App. Exh. A at 11.) Despite Bank One's limited challenge to Iowa's EFT law, the majority declared that *"Congress has made clear in the [National Bank Act] its intent that ATMs are not to be subject to state regulation. . . . "* (App. Exh. A at 11) (emphasis added). This sweeping conclusion, however, directly contradicts that of the Ninth Circuit Court of Appeals in an earlier ATM case: *"Congress has specifically declined to restrict state regulation in the ATM context [by passing the EFTA]." Valley Bank of Nevada v. Plus System, Inc.*, 914 F.2d 1186, 1194 (9th Cir. 1990) (emphasis added).

In dissent, Senior Circuit Judge Myron H. Bright specially noted that the majority's broad language about the scope of the EFTA completely jettisoned all of Iowa's EFT law as it applies to national bank ATMs. (App. Exh. A at 12.) "[The provisions of Iowa's EFT law which] are

valid, evenhanded consumer protections are not preempted by federal law." (App. Exh. A at 13.) Regarding the National Bank Act, he noted that Iowa's EFT law "applies with equal force against both state and national banks" and that "*[e]very* bank is required to comply and no advantage is gained by state chartered institutions in the process." (App. Exh. A at 15.) He concluded that the result reached by the majority violated the firmly entrenched congressional policy of competitive equality between national banks and state banks, *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 133 (1969), handing the former "a free pass" and "a distinct and favored position" in the area of ATMs. (App. Exh. A at 15.) "Competitive equality this is not." (App. Exh. A at 15.)

REASONS FOR GRANTING THE PETITION

A substantial and compelling question of national import exists on whether the federal EFTA governs the ATMs of all financial institutions or whether the National Bank Act implicitly carves out a special class for the ATMs of national banks, which would be impervious to consumer-oriented regulations enacted by the States. This important federal question should be settled by the Court. The Eighth Circuit found preemption in a way which conflicts with congressional policy and the Court's decisions. Sup. Ct. R. 10.

A. Consumers will be harmed.

According to the Eighth Circuit, the States may enact ATM regulations governing all ATMs – except those of

national banks. National banks that have deceptive, misleading, unfair, or vulnerable ATM operations would thus be able to sidestep every state ATM regulation designed to protect consumers. Factual information can be subtly mixed with advocacy; too much information can lead to "information overload"; systems can malfunction or undergo manipulation. Construing the EFTA as a limited mandate leads to the anomaly that the States may protect some consumers – but not those using national bank ATMs – from ATM abuses. Bank One never offered to the District Court an explanation why national bank ATMs "should be singled out as an area in need of fewer consumer protections," especially when the EFTA "suggests [such] protections are essential for ATMs." (App. Exh. B at 62.)

Iowa's "even-handed" and "carefully crafted" EFT law (App. Exh. B at 61, 62, 74) has governed ATMs in Iowa for nearly twenty-five years. *See* 1976 Iowa Acts, ch. 1214, §§ 9-21. The Eighth Circuit's broadly worded opinion, however, provides ample authority for national banks to strike down every state ATM regulation that protects consumers, including bans on ATM fees and surcharges intended to protect consumers in rural America. " '[T]he more remote the ATM . . . , the less incentive for reasonable fees, and the more captive the bank consumer.' " "New Kind of ATM Fee Riles Consumers and a Few Lawmakers," 10 Bank. Policy Rep. 4 (May 20, 1996) (quoting Rep. Bernard Sanders).

B. All consumers, not just those in Iowa, will be harmed.

ATM regulation is more than a passing interest of one state. State and local governments across the nation continue to regulate ATMs, *see* Elec. Banking L. & Com. Rep. 20 (March, 1999), and the Ninth Circuit's decision in *Valley Bank of Nevada*, 914 F.2d at 1194, provides strong support for such regulation. However, the Eighth Circuit now says otherwise. The uncertainty resulting from this conflict arises at a time when public interest in ATM regulation, and litigation, is growing. *E.g., Bank of America v. City and County of San Francisco*, No. C 99 4817-VRW, (N.D. Cal.1999), *appeal docketed*, Nos. 99-17590, 17591 (consolidated) (9th Cir. 1999) (national bank challenge to local ban on ATM surcharges); *First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999) (national bank challenge to state ban on ATM surcharges). Uncertainty mars planning and confuses consumers. Greguras & Wright, "The Preemption Dilemma Under the New EFT Act," 12 U.C.C.L.J. 3, 4 (1979).

C. The Eighth Circuit decision treads upon the traditional power of the States.

The Eighth Circuit's decision ignores the history of ATM regulation as well as the role of the States in our federalist system. State laws, not federal law, originally governed electronic fund transfers as they affect consumers. Thus, as technological improvements in the 1970s led to increased ATM usage, the Iowa General Assembly responded by passing Iowa's EFT law in 1976 to create a single, statewide network. *See* 2 D. Baker & R. Brandel,

The Law of EFT Systems § 24.03 (1999). Consumer protection is a traditional power of the States, *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989), and "banking and related financial activities are of profound local concern," *Lewis v. B.T. Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980). Congress entered this state arena slowly and carefully, reviewing technological studies and corresponding state laws, including Iowa's EFT law. *See* Greguras & Wright, "How the New EFT Act Affects the Financial Institution/ Consumer Relationship," 11 U.C.C.L.J. 207, 236 (1979); Taffer, "The Making of the Electronic Funds Transfer Act," 13 U.S.F.L. Rev. 231, 238 & n. 43 (1979).

As a result, Congress passed the EFTA in 1978. Unlike other federal regulatory schemes, the EFTA – as was predicted, *see* "EFT and Privacy," 64 Fed. Res. Bull. 279, 279 (April, 1978) – represented just the first step by Congress in this area. In enacting the EFTA, Congress found that existing laws "[do not clearly define] the rights and liabilities of consumers, financial institutions, and intermediaries," 15 U.S.C. § 1693(a), and thus defined the EFTA's "primary objective" as "the provision of individual consumer rights," 15 U.S.C. § 1693(b). The EFTA, however, was not comprehensive legislation; it only addressed a few consumer protection issues, because Congress contemplated that the States would fill in its many gaps. Congress crafted a broad anti-preemption provision which makes clear that the States do not occupy a subordinate position in the federal regulatory program. 15 U.S.C. § 1693q.

D. The Eighth Circuit decision disrupts the firmly entrenched policy of competitive equality by excepting national bank ATMs from the EFTA.

The EFTA does not just regulate banks; it regulates all financial institutions and other ATM service providers. Before enacting the EFTA, Congress was concerned that any legislation governing electronic fund transfers might adversely affect competition among financial institutions. 1 D. Baker & R. Brandel, *The Law of EFT Systems* § 12.03 (1999). The Eighth Circuit's decision suggests, however, that the States may not regulate national bank ATMs to protect individual consumers and that national banks – alone among financial institutions – do not come within the EFTA. The decision rests upon an erroneous expansion of the National Bank Act that will hinder competition among financial institutions.

The States have always played a role in the regulation of national banks. *See Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980). State regulations that govern all financial institutions also govern national banks if those regulations do not "prevent or significantly interfere with" the exercise by national banks of their federally granted powers. *Barnett Bank v. Nelson*, 517 U.S. 25, 33 (1996). *See Atherton v. Federal Deposit Ins. Corp.*, 519 U.S. 213, 220 (1997) ("[i]t is only when [a] State law incapacitates [national] banks from discharging their duties to the government that [the state law] becomes unconstitutional"). Iowa's EFT law has not prevented or significantly interfered with the federally granted powers of national banks, because it has governed the ATMs of all financial institutions in Iowa since 1976.

In the past, insurance companies, savings and loan associations, mutual savings banks, national banks, state banks, credit unions, uninsured pension funds, and other financial institutions sought to achieve competitive advantages against each other through legislation. *See* R. Robertson, *The Comptroller and Bank Supervision: A Historical Appraisal* 7-8, 144-46, 185-86 (McCall Printing, 1968). Recently, Congress made clear that the policy of competitive equality should apply to all financial institutions. In late 1999, Congress amended the EFTA in the landmark Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338, and entitled the amendment the "ATM Fee Reform Act of 1999," S. 900, 106th Cong., 1st Sess. §§ 701-05 (1999). There was no "national bank exception" in that comprehensive legislation. Such an exception to the EFTA would directly conflict with the purpose of the Modernization Act to create a level playing field for all financial institutions. By insisting that the EFTA does not really mean what it says, national banks such as Bank One merely seek to grade that playing field decidedly in their favor when it comes to ATMs.

E. The Eighth Circuit decision favors large interstate banks over small independent banks.

Like the federal government, the States have a legitimate interest in regulating the business of banking. *See Lewis v. B.T. Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980). Rural states like Iowa have a particularly strong interest in ensuring the continued viability of small, independent banks that serve the financial needs of a small, widely

dispersed population, and Iowa's EFT law as a whole purports to protect this interest.

If the sweeping conclusion of the Eighth Circuit leads to the dismantling of all state ATM regulations as they apply to national banks, including bans on ATM fees and surcharges, then the congressional policy of competitive equality will stop short of the doorsteps to small banks in rural states. "No-fee ATMs" made available throughout a region, if not the nation, by large interstate banks only for their own customers would be an attractive marketing ploy that could jeopardize the continued viability of local financial institutions with similar ATMs available only in the immediate and perhaps nearby areas. *See generally* 2 D. Baker & R. Brandel, *The Law of EFT Systems* § 25.03 (1999).

F. The Eighth Circuit decision diminishes the proper role of the States to protect consumers, contrary to the "clear and manifest intent" of Congress.

Reference to ATMs is not limited to the EFTA and the Federal Reserve Board's regulations. For example, the OCC interprets the National Bank Act as authorizing national banks to engage in ATM operations, 12 C.F.R. § 7.1019, and a 1996 amendment to the National Bank Act provides that "[t]he term 'branch [bank']', as used in this section, does not include an [ATM]," 12 U.S.C. § 36(j). It is the EFTA, however, which is the federal law that specifically and comprehensively addresses ATMs in the context of consumer protection. Congress clearly enabled the States to take a prominent role in preparing and enforcing

ATM regulations for purposes of consumer protection, 15 U.S.C. § 1693q, and limited the role of the OCC to enforcing, against national banks, the few substantive provisions prescribed by the EFTA, 15 U.S.C. § 1693(o) ("[c]ompliance with the requirements imposed under this title" shall, in the case of national banks, be enforced by the OCC). With regard to national banks, Congress specified different responsibilities for the OCC and the States: the OCC plays a limited, defined role in enforcing the few substantive provisions of the EFTA, and the States, if they choose, may play an open-ended role in regulating and enforcing the vast residuum of consumer protections. *Compare* 15 U.S.C. § 1693(o) *with* 15 U.S.C. § 1693q.

Preemption of a traditional state power like consumer protection can occur "only if that result is the clear and manifest purpose of Congress." *Oregon Dep't of Revenue v. ACF Industries*, 510 U.S. 332, 345 (1994). An examination of the EFTA cannot lead to the conclusion that the clear and manifest purpose of Congress was to preempt state ATM regulations designed to protect individual consumers.

G. The Eighth Circuit decision creates disharmony between the National Bank Act and the EFTA when none exists.

(1). The statutes do not conflict.

The National Bank Act specifically enumerates powers of national banks and generally authorizes them to exercise, "subject to law, all such incidental powers as shall be necessary to carry on the business of banking."

12 U.S.C. § 24(Seventh). Nothing in the language of that provision necessarily conflicts with the EFTA; and the provision itself states that the exercise of such incidental powers is "subject to law," 12 U.S.C. § 24(Seventh). That law includes the EFTA.

(2). The decision violates the "plain meaning rule."

In contrast to the National Bank Act, the EFTA specifically and comprehensively governs all ATMs, 15 U.S.C. § 1693a(6), of any "financial institution," including "a State *or National bank*," 15 U.S.C. § 1693a(8) (emphasis added). Regarding preemption, the EFTA "does not *annul, alter, or affect* the laws of any State *relating to* electronic fund transfers" unless such laws provide less protection to consumers than that provided by the EFTA. 15 U.S.C. § 1693q (emphasis added). The Eighth Circuit decision on the limited scope of the EFTA violates the "plain meaning rule" of statutory construction. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 222 n. 14 (1991) (facially unambiguous statute precludes resort to principles of statutory construction in an effort to determine congressional intent except in "rare and exceptional circumstances").

(3). The legislative history reveals Congress's intent that the States play a significant role in ATM regulation.

A legislative committee observed that the EFTA's anti-preemption provision aligned with "Congress' long-standing policy of deferring to those States which choose to provide more stringent consumer safeguards." S. Rep. No. 915, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S.C.C.A.N. 9273, 9403, 9420. A bill proposing to pre-empt state regulation of shared ATMs never reached the floor. *See* S. 2293, 95th Cong., 1st Sess., 123 Cong. Rec. 37, 234-36 (1977).

(4). The EFTA is the more specific statute.

Any argument that the National Bank Act precludes the States, in an effort to protect consumers, from grouping national bank ATMs with the ATMs of every other financial institution necessarily presumes that a more general provision should prevail over more specific, comprehensive provisions. If, however, the EFTA and the National Bank Act are irreconcilable, the more specific law prevails. *United States v. Estate of Romani*, 523 U.S. 517, ___, 118 S. Ct. 1478, 1487 (1998). Here, that law is the EFTA.

CONCLUSION

The Petition for Writ of Certiorari should be granted to resolve the compelling issues presented in this case.

Respectfully submitted,

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APPENDIX EXHIBIT A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-3166

Bank One, Utah, National Association,

Plaintiff/Appellant,

v.

Michael K. Guttau, in his official capacity as Superintendent of Banking and Administrator of Electronic Transfer of Funds, Iowa Division of Banking, Iowa Department of Commerce,

Defendant/Appellee.

Comptroller of the Currency,

Intervenor Plaintiff/Amici on behalf of Appellant,

Consumer Bankers Association; Cash Station, Inc.; NationsBank, N.A.; First National Bank of McCook, Nebraska; Norwest Bank Iowa, N.A.; U.S. Bancorp; Firstar Corporation,

Amici on behalf of Appellant,

Appeal from the United States District Court for the Southern District of Iowa.

Iowa Bankers Association; Iowa Independent Bankers Association; Iowa Credit Union League,

Amici on behalf of Appellee.

Submitted: January 12, 1999
Filed: September 2, 1999

Before RICHARD S. ARNOLD, BRIGHT, and WOLLMAN,[1] Circuit Judges.

WOLLMAN, Chief Judge.

Bank One, Utah, N.A. (Bank One) appeals from the district court's denial of a preliminary injunction that would prevent the state of Iowa (the State) from enforcing Iowa statutes restricting Bank One's operation of automated teller machines (ATMs). Because we find that certain provisions of the Iowa Electronic Funds Transfer Act (EFTA), Iowa Code § 527, are preempted by section 36 of the National Bank Act (NBA), 12 U.S.C. §§ 21-216d, we reverse the district court's order and remand for the entry of a permanent injunction prohibiting enforcement of the relevant sections.

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[1] Roger L. Wollman became Chief Judge of the United States Court of Appeals for the Eighth Circuit on April 24, 1999.

I.

Bank One is a national bank organized under the NBA. Its main office is located in Salt Lake City, Utah, and it has no branch offices in Iowa. In 1997, Bank One installed ATMs at twenty-four retail store locations in Iowa, including eleven at Sears, Roebuck & Co. (Sears) stores throughout the state.

In October of 1997, the Iowa Superintendent of Banking ordered Sears to cease operation of the ATMs, citing multiple violations of the Iowa EFTA. On December 26, 1997, the State filed an action in state court against Sears to prevent the operation of the ATMs and to assess a fine. As a result, Sears instructed Bank One to remove all of its ATMs from Sears stores in Iowa. Bank One complied with Sears's request and placed the ATMs in storage pending the outcome of this litigation.

Bank One filed suit in district court, seeking a declaration that provisions of the Iowa EFTA restricting out-of-state banks from operating ATMs within Iowa are preempted by the NBA and praying for the issuance of a preliminary and permanent injunction. Bank One's complaint also alleged that the restrictions violate several provisions of the United States Constitution. The district court denied Bank One's motion for a preliminary injunction, finding that the challenged provisions of Iowa law were not preempted and concluding that Bank One was unlikely to succeed on any of its constitutional claims.

II.

Although Bank One's motion asked for a preliminary injunction, we may consider it as a motion for a permanent injunction. *See generally Minnesota Dep't of Econ. v. Riley*, 107 F.3d 648, 649 (8th Cir.1997) (reviewing a district court grant of a preliminary injunction and granting a permanent injunction because all issues were questions of law). Because Bank One and the State disagree only on questions of law, nothing remains for the district court to resolve regarding the underlying facts. Accordingly, we must determine whether a permanent injunction is appropriate.

In determining whether a preliminary injunction should be issued, a district court must take into account the threat of irreparable harm to the movant, the balance between this harm and the harm to the other party if the injunction is granted, the probability of movant's success on the merits, and the public interest. *See Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir.1981) (en banc). The standard for granting a permanent injunction is essentially the same as for a preliminary injunction, except that to obtain a permanent injunction the movant must attain success on the merits. *See Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n. 12 (1987).

Although we have said that the four Dataphase factors are applicable in cases involving permanent injunctions, *see, e.g., Randolph v. Rodgers*, 170 F.3d 850, 857 (8th Cir.1999); *Layton v. Elder*, 143 F.3d 469, 472 (8th Cir.1998); *Fogie v. THORN Americas, Inc.*, 95 F.3d 645, 654 (8th

Cir.1996), we conclude that the balance-of-harm and public-interest factors need not be taken into account in a situation such as that which exists in the present case. If Bank One proves that the relevant provisions of the Iowa EFT are preempted by the NBA and that it will suffer irreparable harm if the State is not enjoined from enforcing those provisions, then the question of harm to the State and the matter of the public interest drop from the case, for Bank One will be entitled to injunctive relief no matter what the harm to the State, and the public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law.

A.

The Iowa EFTA contains several provisions relevant to the placement and operation of ATMs within the state. Among other things, it contains an in-state office requirement for the establishment of ATMs:

> A satellite terminal shall not be established within this state except by a financial institution whose principal place of business is located in this state, one which has a business location licensed in this state under chapter 536A, or one which has an office located in this state and which meets the requirements of subsection 4.

Iowa Code § 527.4(1) (citing *id.* § 527.4(4), which sets various restrictions on the operation of ATMs). All banks, including national banks, must file an informational statement with the Iowa Superintendent of Banking (the administrator) stating the name of the business, the location of the terminal, a schedule of required charges, and an agreement that the bank will maintain the terminal in

compliance with the Iowa EFTA. *See id.* § 527.5(3). If the administrator does not respond to the informational statement within thirty days of its filing, the informational statement is deemed to have been expressly approved. *See id.* § 527.5(7).

In addition to the in-state office and approval requirements, the Iowa EFTA limits the advertising that may be placed on an ATM. It provides:

> A satellite terminal in this state shall bear a sign or label identifying each type of financial institution utilizing the terminal. A satellite terminal location in this state shall not be used to advertise individual financial institutions or a group of financial institutions. However, a satellite terminal shall bear a sign or label no larger than three inches by two inches identifying the name, address, and telephone number of the owner of the satellite terminal. The administrator may authorize methods of identification the administrator deems necessary to enable the general public to determine the accessibility of a satellite terminal.

Id. § 527.5(5).

The NBA grants national banks the authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking." *First Nat'l Bank of E. Ark. v. Taylor*, 907 F.2d 775, 777 (8th Cir.1990) (quoting 12 U.S.C. § 24 (Seventh)). Bank One argues that the NBA implicitly authorizes the placement of ATMs without restriction by the states. The provisions of the Iowa EFTA, it argues, impair the ability of a national bank to place its ATMs and to advertise thereon.

"[G]rants of both enumerated and incidental 'powers' to national banks [are] grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank v. Nelson*, 517 U.S. 25, 116 S.Ct. 1103, 1108 (1996). Where state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," it may be found to be preempted. *Id.* at 1108 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). State regulations are not pre-empted, however, when Congress "accompan[ies] a grant of an explicit power with an explicit statement that the exercise of that power is subject to state law." *Id.* at 1109. Congress predicated the establishment of national bank branches upon compliance with state regulations. *See* 12 U.S.C. § 36(c). Therefore, in order to determine whether the NBA preempts the Iowa regulations, we must determine whether an ATM is a "branch" as defined in section 36.

In 1996, Congress amended section 36 to read, "[t]he term 'branch', as used in this section, does not include an automated teller machine or a remote service unit." *See* 12 U.S.C. § 36(j). Thus, whatever regulatory authority the states may retain with respect to national bank branches, the 1996 amendment clearly expresses Congress's intent that that authority no longer extends to national bank ATMs.

That intent is made even clearer in light of the assumption that Congress enacts legislation with knowledge of relevant judicial decisions. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-99 (1979). Prior to the 1996 amendment, courts had held that because ATMs were branches they were subject to state restrictions. *See*

Colorado ex rel. State Banking Bd. v. First Nat'l Bank of Ft. Collins, 540 F.2d 497, 499 (10th Cir.1976) (finding state regulation applied because ATM was a branch); *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921, 948 (D.C. Cir.1976) (same); *cf. Independent Bankers Ass'n v. Marine Midland Bank*, 757 F.2d 453, 463 (2d Cir.1985) (finding that an ATM was not a branch within the meaning of the section 36 because it was owned by a grocery store and merely used by a national bank). By excluding ATMs from the definition of "branch," Congress eliminated the contingency that formed the basis of those decisions and thus signaled its intention to foreclose the states from imposing location and approval restrictions on a national bank's ATMs.

Likewise, the legislative history of the 1996 amendment makes clear Congress's intent in adopting the amendment, which was enacted as part of the Economic Growth and Regulatory Paperwork Reduction Act of 1996. The purpose of this act was to "strengthen our nation's financial institutions and to increase their competitiveness." S.Rep. No. 104-185, at 1 (1996). The legislation was intended to "allow financial institutions to devote additional resources to productive activities, such as making loans, rather than to compliance with unnecessary regulations." *Id.* "Section [36(j)] clarifies that an 'ATM' or 'remote service unit' is not considered a 'branch' for purposes of federal bank branching law and is therefore not subject to prior approval requirements or geographic restrictions." *Id.* at 24.

Finally, the interpretation given the 1996 amendment by the Office of the Comptroller of the Currency (OCC), which appears in this action as an amicus supporting

Bank One, supports a finding that the relevant Iowa regulations are preempted. As we stated in *Taylor*, the Supreme Court has made it clear that the Comptroller's interpretation of the NBA is entitled to great weight. 907 F.2d at 777 (citing *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987)). *See also Smiley v. Citibank (South Dakota), N.A.*, 116 S.Ct. 1730, 1733 (1996); *Independent Bankers Ass'n of America v. Clarke*, 917 F.2d 1126, 1128 (8th Cir.1990). The OCC has ruled that "[a] national bank may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver." *See* 12 C.F.R. § 7.1019 (1998); *see also* OCC Interpretative Letter No. 821, 1998 LEXIS 15 at *10 (Feb. 17, 1998) (stating that section 36 preempts state geographic restrictions of ATMs). We conclude that the OCC's interpretation is a reasonable one. *See Clarke*, 917 F.2d at 1129 (finding that practical realities supported an OCC conclusion that the term "State Banks" be given a functional definition).

Given the clear language of the 1996 amendment, its legislative history and the judicial decisions that formed the backdrop against which it was adopted, and the interpretation of the regulatory body charged with the responsibility of administering the national banking laws, we conclude that Bank One's ATMs are not subject to the restrictions contained in Iowa Code § 527.4(1).

Bank One also challenges that provision of Iowa law which states that ATMs "shall not be used to advertise individual financial institutions or a group of financial institutions." Iowa Code § 527.5(5). Assuming that this section has any validity as against a national bank ATM in light of our holding with respect to section 527.4(1), we

conclude that it is preempted by the NBA. In *Franklin National Bank v. New York*, 347 U.S. 373 (1954), the Supreme Court held that a state law prohibiting national banks from using the word "saving" or "savings" was preempted by the NBA. In so holding, the Court noted that "[m]odern competition for business finds advertising one of the most usual and useful of weapons. We cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business." *Id.* at 377 (referring to the incidental powers granted in 12 U.S.C. § 24 (Seventh)). In light of *Franklin*, we conclude that the State's attempt to regulate the advertisements on Bank One's ATMs is preempted. *See Barnett Bank*, 116 S.Ct. at 1108 (stating that grants of incidental powers to national banks normally preempt contrary state law).

Moreover, the OCC considered a similar Colorado EFTA provision requiring banks to remove their names from ATMs or to place the names of all other banks whose customers may use the machines. It declared in an interpretative letter that these regulations created a "significant burden on a national bank's right to engage in the business of banking by means of an ATM, as authorized by the [NBA]." OCC Interpretative Letter No. 789 [1997 Transfer Binder] Fed. Banking L.Rep. (CCH) ¶ 81-216 at 90,244 (June 27, 1997) (citing 12 U.S.C. § 24 (Seventh)). Once again giving deference to the OCC's interpretation of the national banking laws, we conclude that this provision of Iowa law must be held invalid as against national bank ATMs.

The State argues that the federal Electronic Funds Transfer Act, 15 U.S.C. §§ 1693-1693r permits the states to regulate the electronic transfer of funds. The federal EFTA was enacted in 1978 "to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems." 15 U.S.C. § 1693(b). The primary objective of the federal EFTA "is the provision of individual consumer rights." *Id.* To achieve that goal, the act allows the states to retain control over electronic transfers:

> This subchapter does not annul, alter, or affect the laws of any State relating to electronic funds transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.

15 U.S.C. § 1693q. Despite the State's claims, this anti-preemption provision is specifically limited to the provisions of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks. State regulation of national banks is proper where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 116 S.Ct. at 1109. Congress has made clear in the NBA its intent that ATMs are not to be subject to state regulation, and thus the provisions of the Iowa EFTA that would prevent or significantly interfere with Bank One's placement and operation of its ATMs must be held to be preempted.

B.

To be entitled to the grant of an injunction, Bank One must establish the existence of irreparable harm. We conclude that it has done so, for in the absence of an injunction the continued enforcement of the relevant provisions of the Iowa EFT would result in irreparable economic loss to Bank One. Accordingly, Bank One is entitled to the entry of a permanent injunction enjoining the enforcement of those provisions.

In view of our holding on the preemption issue, we need not reach Bank One's remaining challenges to the Iowa statutes.

The district court's order is reversed, and the case is remanded for the entry of a permanent injunction.

BRIGHT, Circuit Judge, dissenting.

The court today reverses the district court and orders it to enjoin the State from enforcing Iowa Code Chapter 527, in its entirety, against Bank One – or against any other national bank for that matter. The court does so because it concludes that, following Congress's 1996 changes to the statutory definition of "branch," as found in 12 U.S.C. § 36(j), Automated Teller Machines ("ATMs") are exempt from geographical branching requirements based in state law. While it is true that such requirements no longer pertain to ATMs,[2] I cannot agree that this exemption controls the disposition of the case before us.

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[2] State law geographic restrictions are still incumbent upon national bank entities which meet the statutory definition of a "branch" because these state law restrictions, enforced by the Comptroller, are incorporated by reference in 12 U.S.C. § 36(c).

Even if a national bank's ATMs need not comply with state law geographic restrictions, that does not mean other relevant and permissible state law restrictions are preempted thereby. Many of the sections of Iowa law at issue here are simply not geographical restrictions and ought not be analyzed as though they were.

In my view, those statutory restrictions imposed under Chapter 527 which are valid, evenhanded consumer protections are not preempted by federal law. Thus, I believe that the Superintendent is entitled to enforce them against banks, both state and national alike. I therefore respectfully dissent.

Iowa Code, Chapter 527, titled Electronic Transfer of Funds, has a number of subsections. Many of these subsections are simply not geographical branching restrictions. For example, § 527.5(5) indicates that, "[An ATM] terminal shall bear a sign or label no larger than three inches by two inches identifying the name, address, and telephone number of the owner." Thus, by its terms, this subsection is a straightforward consumer protection measure. The need for such measures should be obvious. As any contemporary user of ATMs is bound to attest, this technology, convenient though it is, is fraught with danger, and anecdotal evidence suggests that errors are not an infrequent occurrence. Among other possible malfunctions, bank notes may be dispensed improperly, deposits may be incorrectly recorded, and terminals may simply "eat" a customer's ATM card, refusing to return it for reasons unknown. When such problems occur, customers deserve the information necessary to correct them. But if ATMs are unmarked, consumers are seriously hindered in any attempt to rectify even glaring errors. Section 527.5(5)

is nothing more than a rational attempt to address this problem and guarantee that aggrieved ATM users have recourse to the machine's owners.

Protection of the consumer is well within the power of States to render and is not preempted by federal law. In the recent case of *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), the Supreme Court had reason to consider the contours of preemption in the context of federal banking law. There the Court noted that, "[i]n defining the preemptive scope of statutes and regulations granting a power to national banks . . . normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Id.* at 33. The Court went on to add, however, that "[t]o say this is *not* to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Id.* (parenthetical in original) (emphasis added). Thus, when a State attempts to regulate the activities of a national bank within its jurisdiction, the State's laws are not preempted if they create no significant interference with the national bank's exercise of its due powers.

A subsection of Chapter 527, such as § 527.5(5), which does no more than protect innocent Iowans through the imposition of a de minimus labeling requirement creates no significant interference with any legitimate power vested in national banks, explicit or otherwise. Thus, in my view, these subsections are simply not preempted.

Moreover, it is important to note that the statute before us applies with equal force against both state *and* national banks. *Every* bank is required to comply and no advantage is gained by state chartered institutions in the process. This latter point is critically important because the questions raised by consumerism might warrant a different analysis if Iowa's statute were constructed so as to favor state banks, giving them an advantage over their national bank counterparts in the ongoing competition for borrowers, deposits, and fees. After all, the National Bank Act ("NBA") has been repeatedly interpreted to prevent such competitive imbalances and to insure that national banks are allowed to compete on an even footing with state banks. *See First Nat'l Bank of Logan, Utah v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) ("Congress intended to place national and state banks on a basis of 'competitive equality'. . . . "); *First Nat'l Bank in Plant City, Florida v. Dickinson*, 396 U.S. 122, 131 (1969) (The NBA "respond[s] to the competitive tensions inherent in a dual banking structure . . . [and] reflects the congressional concern that neither system have advantages over the other. . . . ").

Ironically, the court's conclusion in this case is at odds with this important principle of competitive equality. State chartered banks remain bound by Iowa's consumer protection laws. To the extent that the court's decision today means that national banks are given a free pass, national banks thereby achieve a distinct and favored position under the law. Competitive equality this is not.

The laws of Iowa relating to ATM banking, and granting protection to Iowa residents and others using

such services, should be enforced. I do not here attempt to delineate whether some other restriction in the Iowa Code are not applicable to national banks. Those issues may be revisited on further litigation in this case. Unfortunately, the majority has given the defendant, Iowa's Superintendent of Banking, no opportunity to focus on the consumer protection aspects of Iowa law. The majority not only reverses the denial of a preliminary injunction but, sua sponte, remands for the entry of a permanent injunction. Such action was not requested by the plaintiff, Bank One, and is unwarranted, at least until the issues raised by this case are fully litigated. I would uphold the district court's order retaining the status quo by denying the preliminary injunction and remanding the case to the district court for further proceedings.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

BANK ONE, UTAH, NATIONAL ASSOCIATION, Plaintiff, vs. MICHAEL K. GUTTAU, in his official capacity as Superintendent of Banking and Administrator of Electronic Transfer of Funds, Iowa Division of Banking, Iowa Department of Commerce, Defendant.	CIVIL NO. 4-98-CV-10247 ORDER

Before the Court is a motion for preliminary injunction, filed May 7, 1998, by plaintiff Bank One, Utah, National Association ("Bank One" or "the Bank").[1] Defendant Michael Guttau, in his official capacity as Superintendent of Banking and Administrator of Electronic Transfer to Funds, Iowa Division of Banking, Iowa Department of Commerce ("the Administrator"), resisted the motion and filed a motion to dismiss on May 28,

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[1] The Office of the Comptroller of the Currency ("OCC") filed an amicus curiae brief in support of plaintiff Bank One June 1, 1998.

1998.[2] Bank One resisted the motion to dismiss, and filed a reply brief June 1, 1998. This Court held a hearing June 5, 1998. The matter is now considered fully submitted.

I. BACKGROUND

Plaintiff Bank One is a national bank organized and existing under the National Bank Act ("NBA"), 12 U.S.C. § 21 *et seq.* The Bank's main office is in Salt Lake City, Utah, and it has no branch offices in Iowa. Bank One owns and operates "Rapid Cash" Automatic Teller Machines ("ATMs") across the United States.[3] In 1997, Bank One installed and operated several ATM machines in Sears, Roebuck & Co. ("Sears") stores across Iowa, pursuant to a contract between the two businesses.

On October 23, 1997, the Administrator ordered Sears to cease operation of the ATMs, citing several violations of Iowa ATM law. At the time, the Administrator was unaware of any contractual relationship concerning the ATM machines between Sears and Bank One. Although Iowa law afforded Sears thirty days to appeal the cease-and-desist order, Sears did not exercise its option to do

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[2] The Iowa Bankers Association, the Iowa Independent Bankers Association, and the Iowa Credit Union League filed an amicus curiae brief in support of defendant June 25, 1998.

[3] Many of the laws discussed in the instant case refer to "electronic fund transfers," a term which includes several types of financial transactions. Bank One challenges Iowa law only as it pertains to ATMs. Therefore, the contents of this Order are concerned solely with the manner in which the relevant laws regulate ATMs, and do not consider the relationship between the laws at issue and other electronic fund transfers.

so. In December 1997, the Administrator filed a state district court action to enforce the administrative orders and to enjoin Sears from establishing, operating, or utilizing ATMs in Iowa in violation of the Iowa Code.[4] After the Administrator filed suit, Sears instructed Bank One to remove all of its ATMs in Iowa stores. Bank One complied with Sears' request and is currently holding the ATMs in storage.

Bank One filed suit in this court, challenging several provisions of Iowa law. Specifically, Bank One attacks five types of restrictions contained in Iowa's electronic fund transfer ("EFT") law. The Bank describes the restrictions as follows:

> 1) a geographic restriction barring out-of-state banks from establishing and operating ATMs in Iowa, *see* Iowa Code § 527.4(1);
>
> 2) requirements that banks apply for and obtain permission to establish and operate each separate ATM in Iowa, *see* Iowa Code §§ 527.5(3) and (7); Iowa Admin. Code r. 187-10.4(3) (1996);
>
> 3) a pricing restriction that limits what an ATM owner may charge for services, *see* Iowa Code § 527.5(6);
>
> 4) interconnection and "monopoly switch" restrictions concerning the configuration and processing of transactions at Iowa ATMs, *see* Iowa Code §§ 527.5(8)(a), 527.9; Iowa Admin. Code r. 187-10.4(3)b(5) (1996); and

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[4] The parties filed cross-motions for summary judgment in the case. The parties have fully briefed the motions, and oral argument was held May 22, 1998. The court's ruling on said motions is pending.

> 5) an advertising restriction that flatly bans advertising at Iowa ATMs, *see* Iowa Code § 527.5(5).

Plaintiff's Memo. of Law in Supp. of Mtn. for Prelim. Injunction, at 1. In general, Bank One argues that these provisions of Iowa law conflict are contrary to various federal statutes and the United States Constitution. In his motion to dismiss, the Administrator asserts that the state lawsuit, involving the Administrator and Sears, requires this Court to abstain from hearing the instant case, pursuant to the Younger abstention doctrine. Initially, the Court will discuss the state law which provides for these ATM restrictions, and the specific statutory and regulatory sections that Bank One challenges. Because the Bank challenges several state law provisions, the relevant statutory language is set forth below.

II. IOWA ATM LAW

A. The Geographic Restriction

The Iowa Code contains the following geographic restriction:

> A satellite terminal shall not be established within this state except by a financial institution whose principal place of business is located in this state, one which has a business location licensed in this state under chapter 536A,[5] or one which has an office located in this state and

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[5] Chapter 536A is the Iowa Industrial Loan Law.

which meets the requirements of subsection 4,[6] Iowa Code § 527.4(4).

Iowa Code § 527.4(1). Plaintiff challenges this restriction on several grounds. First, Bank One argues that the restriction is pre-empted by the NBA because Iowa law interferes with the powers the NBA grants national banks. Second, Bank One argues that the restriction violates the dormant Commerce Clause because the restriction discriminates against interstate commerce by benefitting in-state economic interests through burdening out-of-state competitors. Finally, Bank One argues that the restriction violates the Equal Protection Clause

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[6] Subsection 4 states:

A financial institution whose licensed or principal place of business is not located in this state may establish, control, maintain, or operate any number of satellite terminals at the locations identified in subsection 3, paragraphs *"a"*, *"b"*, *"c"*, *and d"* if both of the following apply:

a. The other state provides for the establishment, control, maintenance, or operation of satellite terminals by a financial institution, whose licensed or principal place of business is located in this state, on a reciprocal basis.

b. All satellite terminals, wherever located, that are owned, controlled, maintained, or operated by the financial institution are available for use on a nondiscriminatory basis by any other financial institution which engages in electronic transactions in this state and by all customers who have minimum contact with this state and who have been designated by a financial institution using the satellite terminal and who have been provided with an access device, approved by the administrator, by which to engage in electronic transactions by means of the satellite terminal.

Iowa Code § 527.4(4).

because the restriction favors Iowa residents solely by burdening the residents of other states.

B. The Approval and Certification Requirements

Bank One also challenges the following provision:

> An informational statement shall be filed and shall be maintained on a current basis with the administrator by the financial institution controlling a satellite terminal in this state, which sets forth all of the following:
>
> a. The name and business address of the controlling financial institution.
>
> b. The location of the satellite terminal.
>
> c. A schedule of the charges which will be required to be paid by a financial institution utilizing the satellite terminal.
>
> d. An agreement with the administrator that the financial institution controlling the satellite terminal will maintain that satellite terminal in compliance with this chapter.
>
> The informational statement shall be accompanied by a copy of the written agreement required by subsection 1. The informational statement also shall be accompanied by a statement or copy of any agreement, whether oral or in writing, between the controlling financial institution and a data processing center or a central routing unit, unless operated by or solely on behalf of the controlling financial institution, by which transactions originating at that institution will be received.

Iowa Code § 527.5(3). Another code section supplements this provision:

> If the administrator finds grounds, under any applicable law or rule, for denying establishment of a satellite terminal the administrator shall notify the person filing the informational statement or amendment thereto, within thirty days of the filing thereof, of the existence of such grounds. If such notification is not given by the administrator, the administrator shall be considered to have expressly approved the establishment and operation of the satellite terminal as described in that informational statement or amendment and according to the agreements attached thereto, and operation of the satellite terminal in accordance therewith may commence on or after the thirtieth day following such filing. However, this subsection shall not be construed to prohibit the administrator from enforcing the provisions of this chapter, nor shall it be construed to constitute a waiver of any prohibition, limitation, or obligation imposed by this chapter.

Iowa Code § 527.5(7). Additionally, Bank One challenges an administrative rule, which requires the central routing unit to certify various entities engaged in electronic fund transfers. *See* Iowa Admin. Code r. 187-10.4(3) (1996). The section also sets forth the procedures with which all financial institutions and data processing centers must comply.[7] *Id.* Under Iowa law, a central routing unit must

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[7] For the most part, these procedures are technical. For example, "The establishing financial institution and its data processing center must ensure that all transaction data

confirm and certify compliance with these procedures. *Id.* Bank One argues that this provision is pre-empted by federal law, because the approval and certification requirements interfere with the exercise of powers granted to national banks under the NBA.

Additionally, Bank One argues that Iowa Code § 527.3(2) improperly permits the Administrator to exercise visitorial powers over national banks. The section provides:

> The administrator shall have the authority to examine any person who operates a multiple use terminal, limited-function terminal, or other satellite terminal, and any other device or facility with which such terminal is interconnected, as to any transaction by, with, or involving a financial institution which affects a customer asset account. Information obtained in the course of such an examination shall not be disclosed, except as provided by law.

Iowa Code § 527.3(2). Bank One argues that this provision is pre-empted by 12 U.S.C. § 484(a), which states in pertinent part: "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress. . . . "

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transmitted by the establishing financial institution's data processing center conforms to the central routing unit's electronic communication format standards." Iowa Admin. Code r. 187-10.4(3)a(1) (1996).

C. The Pricing Restriction

The Iowa Code regulates "interchange fees":[8]

> The charges required to be paid by any financial institution which utilizes the satellite terminal for transactions involving an access device shall not exceed a pro rata portion of the costs, determined in accordance with generally accepted accounting principles, of establishing, operating and maintaining the satellite terminal, plus a reasonable return on these costs to the owner of the satellite terminal.

Iowa Code § 527.5(6). Bank One argues that federal law pre-empts this provision. Specifically, Bank One suggests the Iowa statute is contrary to an OCC regulation, 12 C.F.R. § 7.4002 (1998). The regulation expressly permits national banks to charge its customers non-interest fees.

D. The Interconnection and Monopoly Switch Requirements

The Iowa Code contains an interconnection requirement:

> a satellite terminal may be utilized by a financial institution to the extent permitted in this chapter only if the satellite terminal is utilized and maintained in compliance with the provisions of this chapter and only if all of the following are complied with:

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[8] The owner of an ATM terminal charges an "interchange fee" to the financial institution which issued an ATM card that is used at the terminal. *See* Memo. in Supp. of Plaintiff's Mtn. for Prelim. Injunction, at 2.

* * *

2. a. A satellite terminal shall be available for use on a nondiscriminatory basis by any other financial institution which has its principal place of business within this state, and by all customers who have been designated by a financial institution using the satellite terminal and who have been provided with an access device approved by the administrator, by which to engage in electronic transactions by means of the satellite terminal.

* * *

d. Paragraph "a" applies to a financial institution whose licensed or principal place of business is located in a state other than Iowa if all satellite terminals owned, controlled, operated, or maintained by the financial institution whose licensed or principal place of business is located in this state, and to all customers who have been designated by a financial institution using the satellite terminal and who have been provided with an access device.

Iowa Code § 527.5(2). Bank One argues that this requirement is pre-empted by the NBA. Additionally, Bank One argues the monopoly switch requirement is similarly pre-empted. The relevant provision states:

> Satellite terminals located in this state shall be directly connected to either of the following:
>
> (1) A central routing unit approved pursuant to this chapter.

> (2) A data processing center which is directly connected to a central routing unit approved pursuant to this chapter.

Iowa Code § 527.5(8)(a).

Bank One also argues that this code section violates the dormant Commerce Clause.

E. The Advertising Ban

The Iowa Code limits advertising on ATMs:

> A satellite terminal in this state shall bear a sign or label identifying each type of financial institution utilizing the terminal. A satellite terminal location in this state shall not be used to advertise individual financial institutions or a group of financial institutions. However, a satellite terminal shall bear a sign or label no larger than three inches by two inches identifying the name, address, and telephone number of the owner of the satellite terminal. The administrator may authorize methods of identification the administrator deems necessary to enable the general public to determine the accessibility of a satellite terminal.

Iowa Code § 527.5(5). Bank One argues that this provision is pre-empted by the NBA. Additionally, Bank One argues that the ban on advertising violates the Free Speech Clause of the First Amendment.

In its complaint, Bank One seeks a judgment declaring the aforementioned sections of the Iowa Code unconstitutional and a permanent injunction precluding the Administrator from enforcing the aforementioned sections of the Iowa Code against Bank One or any of its

landlords. In the motion before the Court, Bank One seeks a preliminary injunction preventing the Administrator and his agents from taking action against the company to enforce sections 527.4 and 527.5 of the Iowa Code and the relevant implementing regulations.

III. MOTION TO DISMISS

A. Standard of Review

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss all or a portion of the claim "for failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss, the Court will accept as true all factual allegations in the complaint. *McSherry v. Trans World Airlines, Inc.*, 81 F.3d 739, 740 (8th Cir. 1996) (citing *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 163-65 (1993)). However, "conclusory allegations of law and unwarranted inferences are insufficient" to defeat a 12(b)(6) motion to dismiss. *In re Syntex*, 95 F.3d 922, 926 (8th Cir. 1996) (citation omitted). A motion to dismiss will be granted "only if no set of facts would entitle the plaintiff to relief." *Id.* (citing *Conley v. Gibson*, 355 U.S. 41, 45-47 (1957)).

B. *Younger* Abstention Doctrine

Several abstention doctrines require federal courts to decline to exercise jurisdiction under particular circumstances. *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959). Under the *Younger* abstention doctrine, a federal court will abstain from hearing a case when a ruling

will prove especially disruptive to state court proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). A court must address three factors when examining a *Younger* abstention issue: (1) whether there is a ongoing state judicial proceeding; (2) whether an important state interest is involved; (3) whether the federal plaintiff has an adequate opportunity for judicial review of constitutional claims during or after the proceeding. *Middlesex County Ethics Comm. v. Garden State Bar Ass.*, 457 U.S. 423, 432 (1982).

For purposes of this motion to dismiss, the Court will assume that the first two *Younger* abstention factors have been satisfied, *i.e.*, an ongoing state judicial proceeding exists, and an important state interest is involved in the ongoing state proceeding. Nevertheless, defendant's motion fails on the third ground: the Administrator has not demonstrated any manner in which Bank One had or has an adequate opportunity to raise federal issues in the state court proceeding. Initially, the Court notes that Bank One is *not* a party to the state court proceeding. To satisfy this *Younger* factor, the Administrator must demonstrate a reason for this Court to treat Bank One as if it is a party to the state court action.

The Administrator argues that the Bank and Sears are so closely related that the Court should consider Bank One a party to the state court proceeding. The United States Supreme Court has recognized that "there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them. . . . " *Doran v. Salem-Inn, Inc.*, 422 U.S. 922, 928 (1975). However, in *Doran*, the Supreme Court declined to

recognize the case as a situation when such treatment would be appropriate, noting:

> this is not such a case; – while respondents are represented by common counsel, and have similar business activities and problems, they are apparently unrelated in terms of ownership, control, and management. We thus think that each of the respondents should be placed in the position required by our cases as if that respondent stood alone.

422 U.S. at 928-29. In the instant case, the parties are less similar than those in *Doran*.[9] A bank and a retail store do not have similar business interests. Bank One and Sears are separate corporations, unrelated to each other in terms of ownership, control; or management. *See* Second Affidavit of David W. Thomas, ¶ 3. Indeed, although Bank one had a contractual relationship with Sears, the bank also acknowledges that it had similar contracts with another national retail chain. Thus, the outcome of the federal litigation would affect retailers other than Sears. Additionally, Sears' counsel in the state court litigation differs from Bank One's counsel in the instant case. *See* Second Affidavit of David W. Thomas, ¶ 6.

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[9] In *Doran*, the operators of three bars challenged a municipal ordinance prohibiting topless dancing. After a federal court denied the parties' motion for a temporary restraining order, but before the court issued a preliminary injunction enjoining the ordinance, one of the bars resumed its presentation of topless dancing and consequently received criminal summonses. The town attorney argued on appeal that the *Younger* abstention doctrine required the federal court to dismiss the federal complaint because of the pending criminal proceedings against one of the bar operators in the state court.

Bank One and Sears have differing interests in their respective lawsuits, as well. In the state case, Sears is accused of violating the Iowa EFT statutes. In federal court, Bank One challenges the constitutionality of several provisions of the Iowa EFT Act. Sears could not raise all of the constitutional challenges Bank One raises as Sears has not been accused of violating all of the statutes named in Bank One's complaint. Additionally, Bank One has interests in the outcome of the federal litigation beyond Sears because Bank One does not install and operate ATMs exclusively in Sears' stores. This conclusion is similar to that of the Eighth Circuit in *Women's Services*, in which the court found abstention inappropriate.[10]

The purposes underlying the *Younger* doctrine also indicate that abstention is inappropriate in the instant case:

> The principle underlying Younger . . . is that state courts are fully competent to adjudicate constitutional claims, and therefore a federal court should, in all but the most exceptional circumstances, refuse to interfere with an ongoing state . . . proceeding.

Doran, 422 U.S. at 930. In the instant case, a ruling on the federal case would not interfere with the state proceeding as the state proceeding does not involve constitutional

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[10] In *Women's Servs.*, the state court criminal defendant was a physician who had been charged with violating an abortion statute. A different physician and a professional corporation brought suit challenging the constitutionality of three abortion statutes in federal court.

claims. Sears has not defended itself by making constitutional challenges to the Iowa EFT Act; therefore, there is no danger that the federal and state courts could issue conflicting rulings. In *Doran*, the Supreme Court noted that "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute." 422 U.S. at 931. Thus, even if this Court were to issue a preliminary injunction, the relief would not interfere with the Administrator's actions towards parties other than Bank One.[11] A ruling by this Court in the instant case will not interfere with the state court proceeding by the Administrator against Sears, and therefore *Younger* is inapposite.

The Court finds no grounds for deeming Sears and Bank One closely related, for purposes of a *Younger* analysis.[12] The Court finds Sears and Bank One are legally

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[11] At the June 5 hearing, Bank One acknowledged that injunctive or declaratory relief granted by this Court may interfere with the state court proceedings between Sears and the Administrator. Hearing Transcript, at 12-13. To resolve this difficulty, Bank One offered to exclude Sears from the parties affected by the relief the Bank requested. Consequently, the Court agrees to exclude Sears from the parties included within the scope of Bank One's requested relief, and therefore the pending state action will not be affected by this Court's ruling.

[12] The parties also consider whether the Bank and Sears are "closely intertwined." The Eighth Circuit has acknowledged that in some cases, the interests of the parties involved in state and federal litigation may be so intertwined that *Younger* abstention would be appropriate, even though the party seeking relief in federal court is not a named party in a state court

distinct and separate, both as entities and in terms of their interests, and therefore declines to abstain or dismiss the instant case pursuant to *Younger*.[13]

IV. PRELIMINARY INJUNCTION

When evaluating whether to issue a preliminary injunction, a court should consider the following factors: 1) plaintiff's probability of success on the merits; 2) the threat of irreparable harm to plaintiff; 3) the balance between this harm and potential harm to others if relief is granted; and 4) whether an injunction serves the public interest. *See Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 929 (8th Cir. 1994) (citation omitted). No single factor is dispositive. *See Calvin Klein Cosmetics Corp. v. Lenox Lab.*, 815 F.2d 500, 503 (8th Cir. 1987); *Dataphase*, 640 F.2d at 113. The Eighth Circuit favors a flexible analysis:

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proceeding. *See Women's Servs., P.C. v. Douglas*, 653 F.2d 355, 356-359 (8th Cir. 1981) (citing *Hicks v. Miranda*, 422 U.S. 332 (1975)). In analyzing this principle, the court noted:

> Such a case may arise where the interests of the parties seeking relief in federal court are closely related to those of the parties in the pending state proceeding and where the federal action seeks to interfere with pending state proceedings.

Women's Servs., 653 F.2d at 358 (citation and internal quotation marks omitted). The Court believes the standard set forth by the Eighth Circuit is the same analysis set forth in *Doran*.

[13] The Administrator also suggests that Bank One intervene in the state proceeding, rather than file suit in federal court. Absent any persuasive authority explaining why Bank One is required to proceed in this manner, the Court declines to require Bank One to intervene in the state proceeding.

> At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene . . . until the merits are determined. The equitable nature of the proceeding mandates that the court's approach be flexible enough to encompass the particular circumstances of each case. . . . The likelihood that plaintiff will prevail is meaningless in isolation.

Dataphase Sys., Inc. v. CL Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981). Employing the Eighth Circuit's pragmatic approach, this Court now considers plaintiff's motion seeking a preliminary injunction.

A. Plaintiff's Probability of Success on the Merits

Plaintiff has challenged five different restrictions contained in Iowa's ATM law. In challenging the restrictions, Bank One has presented several rationales as to why the restrictions are unconstitutional. Bank One argues that each of the five restrictions are pre-empted by the NBA. The Administrator responds that the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. §§ 1693 *et seq.*, rather than the NBA, is the relevant federal law. Defendant asserts that the EFTA permits states to adopt ATM laws more restrictive than those included in the federal act, and that the NBA is not concerned with the establishment and operation of ATMs by national banks. As a preliminary matter, the Court will briefly review both acts.

1. The National Bank Act

The NBA, 12 U.S.C. §§ 21 *et seq.*, permits and provides for the formation of national banking associations. Congress charged the OCC with overseeing national banks, and the agency is the primary regulator of national banks. The NBA authorizes national banks to: "exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking," including receiving deposits and circulating currency. 12 U.S.C. § 24 (Seventh).

Enactment of the NBA created a dual banking system consisting of federal and state banks. In describing the relationship between federal and state law governing national banks, the Supreme Court has noted:

> National banks are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. . . . It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. . . .
>
> National banks are instrumentalities of the federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties, or control the conduct of their affairs, is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the

> efficiencies of these agencies of the federal government to discharge the duties for the performance of which they were created.

McClellan v. Chipman, 164 U.S. 347, 347-57 (1896); *see also Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944) (" . . . national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the bank's functions."); *National State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980) (finding state anti-redlining statute applicable to national banks, and noting " . . . congressional support remains for dual regulation.").

In some instances, the NBA subjects national banks' branch offices to state banking law provisions. In particular, 12 U.S.C. § 36 sets forth conditions under which national banks may establish and operate branches. For example, a national bank may establish and operate new branch offices if the host state's law permits, so long as the national bank obtains OCC approval. *See* 12 U.S.C. § 36(c). Additionally, a host state's laws concerning community reinvestment, consumer protection, fair lending and the establishment of intrastate branches apply to branches of an out-of-state national bank operating in the host state. *See* 12 U.S.C. § 36(f).

Prior to 1996, ATMs were considered "branches" under section 36, and thus were commonly believed to be subject to state banking law requirements. The Economic Growth and Regulatory Paperwork Reduction Act of 1996 ("EGRPRA") amended section 36(j), which currently reads:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent. *The term "branch", as used in this section, does not include an automated teller machine or a remote service unit.*

12 U.S.C. § 36(j) (emphasis added to EGRPRA amendment). The OCC and Bank One reason[14] that by excluding ATMs from the definition of a "branch," Congress intended to exclude ATMs from state regulation altogether.

2. The EFTA[15]

The Administrator relies upon the EFTA, 15 U.S.C. § 1693, *et seq.*, in arguing that Congress intended State law to control the electronic transfer of funds activities of national banks. Congress set forth the purposes of the Act: "It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer

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[14] Plaintiff's argument that the NBA pre-empts state ATM law is derived primarily from the OCC's interpretation of the NBA, set forth in an OCC Interpretive Letter. *See generally* OCC Interpretive Letter No. 772 [1996-97 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-136 (March 6, 1997); *see also* OCC Interpretive Letter No. 821, Fed. Banking L. Rep. (CCH) ¶ 81-271 (Feb. 17, 1998).

[15] The EFTA includes automated teller machine transactions in its electronic funds transfer definition. *See* 15 U.S.C. § 1693a(6).

systems. The primary objective of this subchapter, however, is the provision of individual consumer rights." 15 U.S.C. § 1693(b). Enacted in November 1978, the EFTA addresses disclosure and documentation of EFT transactions, error resolution, and issuance of access cards, among other subjects. The EFTA also discusses the act's relationship with State law:

> This subchapter does not annul, alter, or affect the laws of any State relating to electronic funds transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection of such law affords any consumer is greater than the protection afforded by this subchapter.

15 U.S.C. § 1693q. The Administrator argues that this Act controls the instant case.

3. The OCC Interpretive Letter

Plaintiff and the OCC argue that the Court must defer to the OCC's interpretive letters, in which the agency sites that the NBA pre-empts state banking law. *See* OCC Interpretive Letter No. 772 [1996-97 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-136 (March 6, 1997). The letter interprets 12 U.S.C. § 36(j) in light of the EGRPRA amendment which became effective September 30, 1996. The letter stated: "We believe national banks have authority to operate ATMs . . . without geographic restriction." *Id.* The letter deferred determining whether state laws could restrict that authority.

A recent OCC interpretive letter did address whether the state of Connecticut could restrict the authority of national banks to install and operate ATMs. *See* OCC Interpretive Letter No. 821, Fed. Banking L. Rep. (CCH) ¶ 81-271 (Feb. 17, 1998). Although the OCC concluded that the state's law did not restrict the installation and operation of ATMs by national banks, the agency explored the issue of whether the NBA would preempt state ATM law that placed restrictions on national banks' ATM operations. The letter concluded that if the state law was interpreted to place geographic restrictions on ATMs operated by federal banks, then the restriction would conflict with the NBA, which permits national banks to operate ATMs without geographic restriction, and therefore federal law would pre-empt state law. The OCC makes a similar pre-emption argument regarding Iowa law in its amicus brief before this Court.

The United States Supreme Court set forth an analysis for determining whether to accord deference to an agency's interpretation of a statute in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). First, a court must examine whether Congress has explicitly addressed the specific question at issue. *Id.* at 843. If Congress has unambiguously addressed the precise issue, then both the court and the agency must adhere to congressional intent. *Id.* at 842-43. When an agency interpretation is available, a court may not "simply impose its own construction on the statute, as would be necessary in the absence of an agency interpretation." *Id.* at 843. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a

permissible construction of the statute." *Chevron*, 467 U.S. at 843. If Congress has expressly delegated authority to an agency to fill gaps in a statutory provision, then the agency interpretation is controlling unless it is arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 844. However, if Congress has implicitly granted the agency authority to interpret a statute, then a court may not substitute its own construction of the statute unless the agency interpretation is unreasonable. *Id.*

The instant case presents questions for which Congress has implicitly granted the OCC authority to interpret the statute, and therefore the Court must consider whether the agency interpretation is reasonable. Although the Court must defer to a reasonable agency interpretation, the Court finds the agency's interpretation unreasonable, for the reasons set forth below.[16]

4. Pre-emption of State Law

Under some circumstances, federal law may pre-empt state law, pursuant to the Supremacy Clause. U.S. Const. art. VI, cl. 2. In analyzing a pre-emption issue, a court "[s]tart[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group,*

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[16] The Court notes that it need not defer to the OCC's First Amendment, Commerce Clause, or Equal Protection interpretations, as the agency has not been charged with constitutional interpretation. The Court will not further address OCC Interpretive Letters treating these issues.

Inc., 505 U.S. 504, 516 (1992) (citations and internal quotation marks omitted). The ultimate touchstone in analyzing a pre-emption issue is congressional intent, which may be expressly stated or implied. *Id.*

A federal statute may expressly pre-empt state law. *See Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996); *ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d 465, 468 (9th Cir. 1987). If a statute does not expressly pre-empt state law, a court should consider whether "the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent." *Barnett Bank*, 517 U.S. at 31 (citations and internal quotation marks omitted). A court may discern congressional intent to pre-empt state law if the "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone*, 505 U.S. at 516 (citations and internal quotation marks omitted). Even if federal law does not appear to occupy a legislative field, the state law is pre-empted if it conflicts with federal law. *Id.* (citations omitted); *see also ANR Pipeline Co.*, 828 F.2d at 468 (citations omitted). A conflict may arise when compliance with the laws of both jurisdictions is physically impossible, or when the state law prevents the fulfillment of Congress' purposes and objectives. *ANR Pipeline Co.*, 828 F.2d at 468 (citations omitted).

Plaintiff has made pre-emption challenges to several provisions of Iowa law. Although the initial pre-emption questions may be considered generally, the Court will address the remaining pre-emption question – whether the statutes conflict with federal law – individually.

Congress has not explicitly addressed the issue of whether the NBA preempts state ATM laws. The sole mention of ATMs relevant to the instant case is the EGRPRA amendment to 12 U.S.C. § 36(j). As the NBA does not explicitly address the whether [sic] state ATM laws are pre-empted, the Court must next examine whether the NBA implicitly pre-empts state law.

This Court has noted authority discussing the dual system of regulation applicable to national banks. *See, e.g., Anderson Nat'l Bank v. Luckett*, 321 U.S. at 248; *McClellan v. Chipman*, 164 U.S. at 347-57; *National State Bank v. Long*, 630 F.2d at 985. Title 12 also indicates congressional intent to subject national banks to state law in some instances. *See* 12 U.S.C. § 36. Indeed, a recent amendment to section 36, the Riegle-Neal Clarification Act of 1997,[17] indicated Congress' intent to retain the dual regulatory system. The NBA does not indicate federal regulation so pervasive as to prevent state law from applying to national banks.

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[17] The provision states:

> The laws of the host State regarding community investment, consumer protection, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State. . . .

12 U.S.C. § 36(f)(1).

a. The In-State Office Requirement

The Court must consider whether Iowa's requirement that a bank maintain an in-state office in order to operate an ATM conflicts with federal law. The Court finds no language in the statutes at issue which creates an irreconcilable conflict. The right to operate ATMs is not an enumerated power in the NBA. However, 12 U.S.C. § 24 (Seventh), authorizes national banks to perform functions incidental to the business of banking, such as receiving deposits. Bank One characterizes Iowa's in-state office restriction as a limitation on the Bank's authority granted by this section. This Court believes the interpretation is inaccurate. The Iowa EFT Act limits all banks, and not solely federally-chartered banks, from establishing ATMs in the state if they do not have an office in Iowa. Contrary to plaintiff's interpretation, the office requirement is not a "geographic restriction" on national banks; it is a restriction on banks without offices in Iowa. Rather than limiting the Bank's authority to carry on its incidental powers, the Iowa law limits the Bank's ability to carry on the business of banking in a state with which it has no formal contacts.

Plaintiff argues *Barnett Bank v. Nelson* controls the instant case. 517 U.S. 25 (1996) (holding federal law preempted state statute which prohibited national banks from selling insurance within the state). In *Barnett*, a state statute prohibited banks from selling most types of insurance, despite a federal law which permitted national banks to sell insurance in small towns. The Supreme Court noted that the powers vested in national banks,

both enumerated and incidental, were not normally limited by state law:

> the Federal Statute says that its grant of authority to sell insurance is an "addition to the powers now vested by law in national [banks]." In using the word "powers," the statute chooses a legal concept that, in the context of national bank legislation, has a history. That history is one of interpreting grants of both enumerated and incidental "powers" to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law. . . .

Barnett Bank, 517 U.S. at 21 (citations and internal quotations omitted). However, the Court also discussed instances in which federal law would not pre-empt state law:

> In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power explicitly granted. *To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's powers.*

Barnett Bank, 517 U.S. at 33 (citations omitted) (emphasis added).

Barnett indicates that the power of a national bank to operate ATMs need not be enumerated to pre-empt state law. The Court believes the operation of ATMs would indeed fall within the incidental powers of a national bank under 12 U.S.C. § 24; *see also First Nat'l Bank v.*

Taylor, 907 F.2d 775, 778 (8th Cir. 1990) ("The 'incidental powers' of national banks are not limited to activities that are deemed essential to the exercise of express powers . . . courts have analyzed the issue by asking whether the activity is closely related to an express power and is useful in carrying out the business of banking."). Despite the Bank's characterization of the requirement as an interference with its ability to perform the business of banking, such as receiving deposits, the Court views the restriction differently. Contrary to plaintiff's characterization, a more accurate statement of the question presented is whether a state law, by preventing banks without in-state offices from operating ATMs, significantly interferes with the ability of national banks to perform the business of banking. This Court believes it does not. Iowa's office requirement, Iowa Code §§ 527.4(1) and (4), does not prevent national banks with offices in Iowa from operating ATMs as a means of serving their customers. The Iowa law only prohibits out-of-state banks, both federally-chartered and state-chartered, from operating ATMs in the state if no branch office exists in the state. Bank One seeks authority under the NBA to expand operations, rather than perform the business of banking.[18] The Court believes the NBA does not provide the Bank with such powers.

Plaintiff also cites the EGRPRA amendment as authority that national banks should not be subject to in-

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[18] A Bank One affidavit admits: "In states such as Iowa, in which Bank One, Utah has no branch offices, *few customers hold ATM cards issued by Bank One, Utah.*" Affidavit of Bard L. Estabrook, ¶ 2 (emphasis added).

state office restrictions. Legislative history indicates that the EGRPRA amendment was an attempt to scale down regulatory paperwork. The subtitle under which the amendment was located was titled "Eliminating unnecessary regulatory requirements and procedures." The Senate Report stated:

> This subtitle addresses regulatory filing requirements that may hamper the business operations of the affected institutions. These requirements may slow the implementation of such ordinary institutions. These requirements may slow product line expansion, business expansion, office premises purchase, or branch moves within a given neighborhood.
>
> Some current regulatory notice and application requirements govern activities that do not have any significant public policy implications. As a result, regulators tend to approve these applications in the ordinary course. Nevertheless, there are delays and costs associated with the preparation of the necessary paperwork and mandated review or notice periods. For instance, the bill as reported will eliminate, for ATMs and in certain other cases, the notice requirements for branch closure. *The bill also eliminates the branch application requirement for ATMs. Federal Reserve Governor Phillips described this latter requirements as "an anachronism," and FDIC Chair Helfer testified that "[w]e do not see a compelling reason for an agency to approve these facilities in advance or even to have prior notice of their establishment.*[19]

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[19] The Chairperson's comment questions the necessity of Iowa's approval requirements; however, the usefulness of

S. Rep. No 104-185, 8 (Dec. 14, 1995) (emphasis added). Plaintiff is correct in noting that the report also described the section as an attempt to remove ATMs from "prior approval requirements or geographic restrictions." *See* S. Rep. No. 104-185, 24 (Dec. 14, 1995). Contrary to plaintiff's interpretation, however, the Court believes such text indicates that Congress intended to fully remove ATMs from the OCC approval requirements set forth in 12 U.S.C. § 36(c), but does not unequivocally establish that Congress intended to remove ATMs from state law requirements altogether, including geographic restrictions. The Court believes the EGRPRA is inconclusive on whether the NBA pre-empts state ATM laws, because the section deals solely with branches of national banks.

The Court finds that Iowa's in-state office requirement does not significantly interfere with the incidental powers of national banks. Consequently, the Court finds that plaintiff is unlikely to prevail on the merits of this claim.

b. The Certification and Approval Requirements

Plaintiff also argues that Iowa's certification and approval requirements are pre-empted. In support of the argument, the Bank contends that Iowa cannot establish licensing requirements which may be used to bar national

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Iowa's requirement is not at issue. Indeed, it is possible that Congress determined OCC approval was unnecessary for ATMs because state regulation provided satisfactory monitoring of ATM facilities.

banks from operating in the state. Additionally, Bank One asserts that the requirements permits states to exercise visitorial authority over national banks, in violation of 12 U.S.C. § 484(a).

Iowa Code § 527.5(3), read alone, contains nothing which might offend federal law. The provision merely requires any bank operating an ATM in Iowa to file an informational statement with the Administrator, including a schedule of charges and an agreement to comply with Iowa ATM law. Section 527.5(7) supplements the aforementioned section, granting the Administrator authority to disapprove a request to establish an ATM terminal in the State. Contrary to plaintiff's view, however, the Court does not believe these provisions are "licensing" requirements. Plaintiff is correct in noting that the Eighth Circuit recognized that Arkansas could not prohibit national banks, "either by direct coercion or through a license requirement," from performing certain banking activities. *First Nat'l Bank v. Taylor*, 907 F.2d 775, 780 (8th Cir. 1990). Plaintiff takes the Eighth Circuit's conclusion out of context, however. The Eighth Circuit did not set forth a general rule forbidding states to "license" national banks. Rather, the statement was made in the context of the particular Arkansas requirements, which the court described as "extensive," including licensing fees, maintenance of specific capital and surplus levels, financial information disclosure, and inspection by the state commissioner of banking. *Id.* at 777 n.6. The informational statement required by Iowa law is benign. *See* Iowa Code § 527.5(3). The Court believes the limited

information requested by the Administrator does not significantly interfere with the Bank's incidental or enumerated powers.

Plaintiff also challenges Iowa Code § 527.5(7), which gives the Administrator authority to disapprove the establishment of an ATM. The Court notes that the provision requires the Administrator to approve the establishment of an ATM unless grounds for denial exist under any applicable law or rule. Thus, the Administrator does not have unfettered discretion in denying permission to establish ATMs. Plaintiff does not challenge any specific grounds for denial of permission to establish an ATM, except the other four restrictions discussed at length in this Order. The Court finds no cause to declare this provision pre-empted.

The Iowa Administrative Code also requires the central routing unit to certify compliance with the Iowa EFT Act.[20] Plaintiff takes issue with this provision because it permits a private entity to certify ATMs. Although plaintiff does not identify the legal basis for its challenge of

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[20] The Iowa administrative rule states, in pertinent part:

> To assist the administrators with compliance examinations of a central routing unit, a central routing unit shall certify financial institutions, satellite terminals located in the state, and data processing centers directly connected to satellite terminals located in this state or directly connected to cardholder financial institutions, to demonstrate that satellite terminals located in this state and the central routing unit are performing in accordance with the requirements of Iowa Code sections 527.5 and 527.9.

Iowa Admin. Code r. 187-10.4(3)a(1) (1996).

this regulation, the Court finds no contravention of federal law. Iowa law requires all ATMs to be connected to a central routing unit, and this regulation is merely an aid to the Administrator in ascertaining compliance with the technical requirements of Iowa Code sections 527.5 and 527.9. The regulations do not delegate authority to the central routing unit to exercise visitorial powers over a national, or other, bank.

Finally, Bank One asserts that Iowa Code § 527.3(2), which permits the Administrator to examine an operator of an ATM, vests the State with visitorial powers over national banks. Initially, the Court notes that the succeeding subsection, Iowa Code § 527.3(3), states: "Nothing contained in this chapter shall authorize the administrator to regulate the conduct of business functions or to obtain access to any business records, data, or information of a person who operates a multiple use terminal. . . ." Reading subsections 527.3(2) and 527.3(3) together suggests a legislative intent to avoid giving the Administrator visitorial authority over any banks through the Iowa EFT Act. Plaintiff provides no authority demonstrating that the Iowa provision has been construed in a manner which permits the Administrator to exercise visitorial authority over national banks. In absence of any indication that the Iowa EFT Act would be construed in such a manner, the Court finds no conflict with Iowa law.[21]

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[21] The Court notes that the "visitorial powers" argument also presents a ripeness issue. A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 118 S. Ct. 1257, 1259 (1998) (citation and internal quotation marks omitted). When interpreting statutes, "[t]he

c. The Pricing Restriction

Plaintiff argues that Iowa Code § 527.5(6), which allows banks to charge only reasonable interchange fees, is pre-empted by a federal regulation which expressly permits national banks to charge customers non-interest fees.[22] Although the federal regulation presented by plaintiff appears to address the ability of a national bank

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operation of a statute is better grasped when viewed in light of a particular application." *Id.* at 1260. Plaintiff's argument that the Administrator could impose visitorial powers over a national bank is entirely speculative and not ripe. The same reasoning is also applicable to Iowa Code § 527.5(7) and Iowa Admin. Code r. 187-10.4(3)a(1) (1996).

[22] The regulation states:

> (a) *Customer charges and fees.* A national bank may charge its customers non-interest charges and fees. . . .
> (b) *Considerations.* The establishment of non-interest charges and fees, and the amounts thereof, is a business decision to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles. A bank reasonably establishes non-interest charges and fees if the bank considers the following factors, among others:
>
> (1) The cost incurred by the bank, plus a profit margin, in providing the service;
>
> (2) The deterrence of misuse by the customers of banking services;
>
> (3) The enhancement of the competitive position of the bank in accordance with the bank's marketing strategy; and
>
> (4) The maintenance of the safety and soundness of the institution.

12 C.F.R. § 7.4002 (1998).

to establish ATM charges, the Court believes the EFTA, and not the NBA, addresses bank charges for the use of ATMs. As the EFTA's declaration of purpose noted, the Act was intended to establish the rights and liabilities of *all participants* in electronic fund transfer systems, which would include the parties charging interchange fees. *See* 15 U.S.C. § 1693(a). This construction is reasonable, as the EFTA contains various provisions regarding charges and fees for use of ATMs. *See, e.g.*, 15 U.S.C. § 1693c(b) (requiring a financial institution to notify customers of any cost increases for access to an account through electronic means); 15 U.S.C. § 1693d(c) (requiring periodic statements to customers including the amount of any fee or charge assessed).

As discussed previously, the EFTA defers to state law unless the state law is inconsistent with the Act. *See* 15 U.S.C. § 1693q. The Court believes that the Iowa requirement that interchange fees be reasonable is consistent with the EFTA.[23]

d. The Interconnection and Monopoly Switch Requirements

The Bank claims that the interconnection requirement of Iowa Code § 527.5(2) impermissibly burdens national

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[23] The Court funds plaintiff's argument that the OCC regulations disfavor a "public utility" ATM system inapposite. The regulation cited by plaintiff appears to be concerned with preventing price collusion among banks, and not with preventing a "public utility" model. A close reading of 12 C.F.R. § 7.4002 (1998) indicates the regulation requires national banks to charge reasonable fees.

banks in performing their incidental powers under the NBA. In effect, plaintiff challenges Iowa's universal access requirement. *See* Memo. of Law in Supp. of Plaintiff's Mtn. for Prelim. Inj., at 17 ("Although in many instances a national bank may wish to provide universal access to its network, state law may not force that decision on national banks wishing to pursue different banking strategies."). As the universal access requirement is concerned with providing ATM access to consumers, it falls within the consumer protection goals of the EFTA. This Court has previously explained the manner in which the EFTA defers to state law requirements which are more stringent, yet consistent with, the federal statute. Accordingly, the Court believes the EFTA permits the Iowa interconnection and monopoly switch requirements as a means of guaranteeing universal access for Iowa ATM users.[24]

e. The Advertising Restriction

As the final prong of the pre-emption argument, plaintiff challenges the advertising restriction set forth at Iowa Code § 527.5. The Bank relies upon *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954). In *Franklin*, the Supreme Court struck down a state law which forbade national banks to use the word "saving" or "savings" in their business or advertising. Iowa Code § 527.5 differs

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[24] Even if the Court were to find that the NBA controls this area, the Court believes the NBA does not pre-empt Iowa law. The ability to choose an ATM network is not part of, and does not interfere with, a national bank's incidental or enumerated powers to perform the business of banking.

from the statute struck down in *Franklin*, in that Iowa does not completely ban advertising. The Supreme Court noted:

> We cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business. It would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it.

Franklin Nat'l Bank, 347 U.S. at 377-78. Unlike the statute at issue in *Franklin*, the advertising restriction set forth in the Iowa Code does not prohibit national, or any other, banks from advertising their ATM services. The restriction only applies to the advertising of financial institutions on ATM machines. This is not a random restriction, but one devised to prevent ATM customer confusion, given Iowa's non-discriminatory access requirements. Accordingly, the restriction is not pre-empted by the NBA, because it does not prevent a national bank from performing its powers incidental to the business of banking.

f. Conclusion

The NBA contains no language expressly pre-empting state ATM law on the issues before the Court. The dual regulatory system of banking, subjecting national banks to state law in some instances, indicates Congress did not intend federal law to occupy the field. After examining each Iowa EFT Act provision challenged by

plaintiff, the Court finds no conflicts between the NBA and Iowa law. Accordingly, the Court finds that plaintiff is unlikely to succeed on the merits of these claims.

5. The Dormant Commerce Clause

The dormant Commerce Clause limits a state's power to enact laws which discriminate against interstate commerce. *West Lynn Creamery v. Healy*, 512 U.S. 186, 192 (1994). Economic protectionism, defined as "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors," is impermissible under the dormant Commerce Clause, unless "the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Id.* (citation and internal quotation marks omitted). "In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *Lewis v. BT Invest. Managers*, 447 U.S. 27, 36 (1980) (citations and internal quotation marks omitted). Regardless of a State's justification for a regulation which affects interstate commerce, a State may not erect barriers against interstate commerce "unless there is some reason, apart from their origin, to treat [out-of-state entities] differently." *Id.* at 36 (citation and internal quotation marks omitted).

When undertaking a dormant Commerce Clause analysis, "the first step . . . is to determine whether [the statute] regulates evenhandedly with only incidental effects on state commerce, or discriminates against interstate commerce." *Fulton Corp. v. Faulkner*, 516 U.S. 325,

331 (1996) (citations and internal quotation marks omitted). A state law that facially discriminates against interstate commerce, or that in effect favors in-state economic interests over out-of-state economic interests, is "virtually per se invalid." *Id.* (citations and internal quotation marks omitted). A statute invalid under the per se rule is subject to strict scrutiny if the defending party wishes to justify it. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 117 S. Ct. 1590, 1601 (1997). A defending party may satisfy this heavy burden by demonstrating that the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* (citations and internal quotation marks omitted). This burden is a heavy one; in fact, "facial discrimination by itself may be a fatal defect." *Id.* (citations and internal quotation marks omitted). However, "where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970); *see also Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (citing the *Pike v. Bruce Church* balancing approach).

a. The In-State Office Restriction

Bank One argues that Iowa's in-state office restriction, Iowa Code § 527.4(1), violates the dormant Commerce Clause because it is a protectionist law which places greater burdens on out-of-state banks than it

places on in-state banks. Arguing that the statute is facially discriminatory, the Bank asserts that § 527.4(1) "prohibits out-of-state banks . . . from establishing ATMs within the State." Memo. of Law in Support of Plaintiff's Motion for Prelim. Inj., at 13. The Administrator responds that the law is facially neutral and that in-state office requirements do not violate the dormant Commerce Clause.

The Iowa statute at issue is not facially discriminatory. Despite plaintiff's argument, the statute contains no discriminatory language. *See* Iowa Code § 527.4(1). Rather than excluding out-of-state banks from establishing ATMs in the state, the statute sets forth the following requirements for these financial institutions to establish satellite terminals in Iowa: (1) an office must be located in the state; (2) the institution's home state must provide for the establishment of satellite terminals by out-of-state banks on a reciprocal basis; and (3) any satellite terminals established by the financial institution, wherever they may be located, must offer universal access to the terminals. Iowa Code §§ 527.4(1), 527.4(4). In sum, the statutory language does not prohibit out-of-state banks from establishing ATMs in the state. The statutory requirements for out-of-state banks and in-state banks – an office in Iowa and nondiscriminatory access – are essentially the same.

Although the statute may not be facially discriminatory, this Court must also evaluate whether the statute is discriminatory in effect when construed in conjunction with other statutory provisions. The in-state office requirement, Iowa Code § 527.4(1), is further explained in Iowa Code § 527.2(13): " 'Office' means and includes any

business location in this state of a financial institution at which is offered the services of accepting deposits, originating loans, and dispensing cash, by financial institution personnel in the office." Thus, to satisfy Iowa Code § 527.4(1), the bank must be prepared to offer the banking services discussed above.

Further examination of the Iowa Code clarifies which financial institutions may perform the aforementioned banking services in the state:

> A person other than a state bank which is subject to the provisions of this chapter and a national bank authorized by the laws of the United States to engage in the business of receiving money for deposit, shall not engage in this state in the business of receiving money for deposit, transact the business of banking, or establish in this state a place of business for such purpose.

Iowa Code § 524.107(1). This section expressly permits a national bank to perform banking services, and therefore to open a branch, if federal law permits such action.[25]

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[25] Plaintiff is concerned that national banks attain access to the Iowa market, and plaintiff's arguments speak to access by national banks. Accordingly, the Court will not address any relationship between the Commerce Clause and Iowa's ATM law pertaining to out-of-state banks which are organized under the laws of another state. However, the Court notes that in a case heavily relied upon by plaintiff, the United States Supreme Court commented:

> We readily accept the submission that, both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern. . . . [S]ound

Lewis v. BT Inv. Managers, 447 U.S. 27, 38 (1980). In other words, the sole state law requirement for a national bank to operate in Iowa is that federal law must authorize the bank to perform such banking functions.

Accordingly, the Court must examine *federal* law to determine whether a national bank may operate an office in Iowa and thus qualify to operate an ATM under Iowa Code § 527.4(4). Plaintiff cites 12 U.S.C. § 36(g)(1) as the appropriate section governing this question, which provides in pertinent part:

> (g) State "opt-in" election to permit interstate branching through de novo branches
>
> (1) In general
>
> Subject to paragraph (2), the Comptroller of Currency may approve an application by a national bank to establish and operate a de novo branch in a State (other than the bank's home State) in which the bank does not maintain a branch if –
>
> (A) there is in effect in the host State a law that –
>
> (i) applies equally to all banks; and

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financial institutions and honest financial practices are essential to the health of any State's economy and to the well-being of its people. Thus, it is not surprising that ever since the early days of our Republic, the states have chartered banks and have actively regulated their activities.

Lewis, 447 U.S. at 38.

> (ii) expressly permits all out-of-State banks to establish de novo branches in such State; and
>
> (B) the conditions established in, or made applicable to this paragraph by, paragraph (2) are met.[26]

12 U.S.C. § 36(g)(1). As plaintiff explains, and this Court agrees, federal law "permit[s] national banks to establish branches outside their home states only if the new state has a law that 'expressly permits all out-of-State banks [to open such branches]'." Plaintiff's Reply Memo. of Law in Supp. of Mtn. For Prelim. Inj., at 23. No party has cited, and this Court cannot find, any Iowa law which expressly permits out-of-state banks to establish de novo branches in the state.

Plaintiff points out, and again the Court agrees, the result of the interaction between these statutes is that out-of-state national banks cannot open branches, and perform banking services in Iowa – effectively barring the same national banks from opening offices to satisfy the ATM operation requirements of Iowa Code § 527.4. Notably, the fact than national banks are barred from operating ATMs in Iowa is a result of federal law rather than Iowa law. As plaintiff mentions often, the NBA governs activities by national banks, and the NBA provides that a national bank may establish a de novo office by complying with state law. 12 U.S.C. § 36(g)(1). The fact that this

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[26] The Court notes that the conditions listed in the aforementioned paragraph (2) are not relevant to the Commerce Clause issue; therefore, the Court need not state them.

provision exists demonstrates that Congress contemplated instances in which national banks were unable to establish de novo branches in a state because state law would not permit them to do so.

Returning to the initial dormant Commerce Clause question of whether Iowa's law has a discriminatory effect, the only national banks which are barred from establishing ATMs in Iowa are those banks which fail to establish an office. Therefore, any national banks with offices in Iowa are eligible to apply for authority to operate ATMs within the parameters of Iowa Code § 527.4. Iowa's "geographic restriction" for out-of-state banks is essentially an office requirement. Plaintiff's argument to the contrary – that Iowa carefully crafted a law barring out-of-state banks from establishing branch offices to essentially bar out-of-state banks from operating ATMs – is inaccurate. *Federal* law defers to state law regarding the establishment of national bank branches. The state law at issue, and challenged by plaintiff, is a mere office requirement, which is applicable to all banks which operate ATMs in Iowa. Any "discriminatory effect" is a result of federal law, which governs the branch office requirements for national banks.

For the foregoing reasons, the statute at issue can be described as an even-handed statute which indirectly affects interstate commerce. This Court must therefore employ the dormant Commerce Clause balancing analysis: whether Iowa has a legitimate interest in regulating ATMs in this manner, and whether the burden on interstate commerce clearly exceeds the local benefits. As the Court mentioned previously, *supra* note 23, banking and

related financial activities are of "profound local concern."[27] Indeed, the Administrator explains clearly the State's interest in protecting consumers by providing an ATM system which "does not impair the safety and soundness of a person's funds." Defendant's Brief in Resistance to Mtn. for Prelim. Inj., at 36. The State interest is legitimate.

Continuing the analysis, the Court must consider whether the burdens imposed of interstate commerce clearly exceed the local benefits. The Iowa Code sets forth carefully crafted banking law which, in part, ensures the safety and soundness of customers' funds. A financial institution, including a national bank,[28] may not engage in the practice of banking in the state unless it complies with Iowa banking law. The Iowa EFT Act is one part of Iowa banking law, and plaintiff has offered no explanation as to why ATMs should be singled out as an area in need of fewer consumer protections. Indeed, the EFTA suggests consumer protections are essential for ATMs. The parties have presented to the Court limited information discussing the relationship between an in-state office

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[27] The Court recognizes that in *Lewis*, the Supreme Court noted that state banking laws were legitimately a local concern, yet proceeded to declare the Florida statutes in violation of the dormant Commerce Clause. 447 U.S. at 38. The statutes at issue contained outright prohibitions on certain out-of-state financial institutions doing business in Florida. Iowa's statute contains an office requirement which is applicable to all banks doing business in Iowa; thus, the cases are distinguishable.

[28] *See* 12 U.S.C. § 36(f).

and a sound ATM system. At this stage in the proceedings, however, the Court finds that the benefits to consumers resulting from the office requirement outweigh the burdens on interstate commerce, and that the law furthers the State's legitimate interest in consumer protection. The Court finds plaintiff is unlikely to succeed on the merits of this dormant Commerce Clause claim.

b. The Interconnection Requirement

Bank One also argues that Iowa's interconnection requirement, Iowa Code § 527.5(2), violates the dormant Commerce Clause. Plaintiff reasons that the provision violates the dormant Commerce Clause in two ways. First, plaintiff challenges the statute because it "directly requires that all transactions at Iowa ATMs must be routed through Shazam, even if out-of-state networks can process the transactions more efficiently." Memo. of Law in Supp. of Plaintiff's Mtn. for Prelim. Injunction, at 18. Additionally, plaintiff argues that Iowa Code § 527.5(8)(a) gives Iowa's central routing unit power to veto the entry of any competing central processing unit. Defendant responds that the challenged provisions are necessary to provide nondiscriminatory access to ATMs, which Iowa law guarantees, and to support the consumer protection goals of the Iowa EFT Act, including reliability and safety.

The Court finds that the interconnection requirement is not facially discriminatory. The Court also finds no manner in which the interconnection requirement is discriminatory in effect. The fact that all ATM transactions in Iowa must be routed through either an approved central

routing unit ("CRU"),[29] or a data processing center ("DPC") directly connected to the CRU does not result in a discriminatory effect on interstate commerce. The Shazam CRU connection is a requirement for *all* ATMs operating in Iowa and is intended to preserve Iowa's universal access mandate. Shazam is not an "Iowa" network; it is a larger network that Iowa has approved as a CRU. Thus, plaintiff cannot say that the choice of Shazam is, in itself, a forced preference for an in-state business. Plaintiff's argument is circular; the choice of a CRU which provides universal access for all Iowa ATMs is by definition a preference for an in-state network. Iowa could not guarantee universal access in any other manner. Like the in-state office requirement, the Court finds that this requirement applies the same burdens on all ATM operators, and cannot be called discriminatory in effect.[30]

The Court must again employ a balancing analysis if the Court finds the statute evenhanded, with only incidental effects on interstate commerce. *See Pike*, 397 U.S. at 142. The State cites as legitimate interests reliability, safety, and universal access. The State has chosen to operate its ATM system in a monopolistic manner by

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[29] Currently, the only CRU approved in Iowa is Shazam.

[30] The two cases cited by plaintiff, *Hughes v. Oklahoma*, 441 U.S. 322 (1979) and *National Solid Waste Management Assoc. v. Williams*, 877 F. Supp. 1367 (D. Minn. 1995) are inapposite. *Hughes* involved a state law which *forbade* the transportation of minnows for sale out of Oklahoma. *Williams* involved a solid waste management statute which imposed greater costs on out-of-state waste processing than in-state waste processing. As explained, the instant case offers no apt comparison.

requiring all transactions to connect to the Shazam CRU either directly or indirectly through a DPC. The benefits to local consumers include nondiscriminatory access, and the avoidance of stacking problems which arise when multiple networks are involved in a transaction.

Although Bank One argues that the interconnection requirement burdens out-of-state banks, the Court disagrees. Shazam does not exclude banks who wish to participate in the CRU based on out-of-state status. The interconnection requirement is merely a decision by the Iowa legislature regarding the most appropriate manner in which to operate an ATM system. Although Iowa law permits other CRUs to be approved, the agency has currently approved only one: Shazam. The Shazam network does not charge out-of-state banks more to participate than in-state banks. Indeed, there is no evidence of burdens on out-of-state banks that are not placed on in-state banks as well. The Court finds no dormant Commerce Clause violation, and thus plaintiff is unlikely to succeed on the merits of this claim.

6. The First Amendment

Bank One argues that Iowa's ban on advertising at ATMs, Iowa Code § 527.5(5), is a restriction on commercial speech which violates the First Amendment. U.S. Const. amend. I. The Administrator responds that the statute is a legitimate time, place, and manner restriction and is not content-based.

a. Time, Place, Manner Restriction

Because the Administrator argues that the advertising restriction is a legitimate time, place, and manner restriction, this Court must consider whether the restriction is a content-based or content-neutral limitation. "Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791-92 (1989) (citations and internal quotation marks omitted). "[A] restriction on speech is content-based when the message conveyed determines whether the speech is subject to the restriction." *Whitton v. Gladstone*, 54 F.3d 1400, 1403-04 (8th Cir. 1995).

Even a cursory review of Iowa Code § 527.5(5) indicates that it is content-based. The restriction only applies to advertisements of "individual financial institutions or a group of larger financial institutions." Iowa Code § 527.5(5). Apparently any other type of advertisement on an ATM would not run afoul of the Iowa law. The sole distinction between permissible advertisements and impermissible ones, under Iowa law, is content-based – *i.e.*, whether the advertisement contains a message from a financial institution. Under any "commonsense understanding" of the term, the restriction in Iowa Code § 527.5(5) is content-based. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1995). A content-based restriction on speech cannot be considered under a time, place, manner analysis. *Discovery Network*, 507 U.S. at 430-31. The advertising restriction is more appropriately evaluated under a commercial speech analysis.

b. Commercial Speech

The Supreme Court has recognized that a state may regulate commercial speech more freely than some other forms of protected speech. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498 (1996) (citation omitted); *see also Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("The Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."). Among justifications for this lessened protection is "the greater hardiness of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation." *44 Liquormart*, 517 U.S. at 499 (citation and internal quotations omitted). In the context of commercial speech, reasonable time, place, and manner restrictions are permissible, provided that "they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels of communication of the information." *Friedman v. Rogers*, 440 U.S. 1, 9 (1979). A state's power to regulate commercial speech is not boundless, however: "The State retains less regulatory authority when its commercial speech restrictions strike at the substance of the information communicated rather than the commercial aspect of [it]. . . . " *Id.* (citations and internal quotation marks omitted).

A four-part analysis exists for determining whether a regulation of commercial speech exceeds the scope of

restrictions permitted by the First Amendment. *See Central Hudson*, 447 U.S. at 546-66. First, a court must consider whether the expression subject to regulation is protected by the First Amendment; that is, whether the speech is truthful and nonmisleading. *Id.* at 566. If the expression is truthful and nonmisleading, then a court must consider whether the asserted governmental interest is substantial. *Id.* When the government interest is substantial, then a court must make two additional inquiries: whether the regulation directly advances the governmental interest asserted; and whether the regulation is more extensive than necessary to serve that interest. *Id.* Although the State has the burden of proving a reasonable fit between the legislature's ends and the means chosen to accomplish the ends, the State need not use the least restrictive means available. *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480-81 (1989).

In the instant case, Bank One does not seek to place false and deceptive advertisements on its ATMs. Indeed, the advertisements Bank One seeks to place are undisputedly truthful, and a motive for placing deceptive information regarding financial institutions on ATMs in difficult to imagine. Thus, the advertisements Bank One seeks to employ constitute the type of commercial speech protected by the First Amendment. *Fox*, 492 U.S. at 475.

The Administrator justifies the restriction because the state seeks to avoid advertisements which have the potential for misleading customers. The Administrator explains the advertising restriction stems from the state's universal access policy; the State worries that displaying advertising for a particular institution on an ATM may

mislead customers into believing they do not have access to that particular terminal. Preventing ATM users from being misled is a substantial government interest. *See Friedman v. Rogers*, 440 U.S. 1, 15 (1979) (finding a substantial state interest in protecting the public from the misleading use of optometrical trade names).

At this point, the burden is on the Administrator to establish a "reasonable fit" between its legitimate interest in avoiding misleading customers and the state prohibition of advertising financial institutions at ATMs. The Court believes the State has met its burden. The absence of conspicuous signage on an ATM eliminates the State's concern that members of the public may misconceive their ability to access an ATM.

Additionally, the means used by the State is quite narrowly tailored. The bank operating each ATM must identify itself in the manner described by the Iowa statute. This eliminates any concern regarding a lack of information. By statutory mandate, consumers will always be able to discern the bank operating a particular ATM. The advertising restriction is also reasonable because financial institutions have several other means of advertising. The parties have not indicated any other method of commercial speech by a financial institution which is restricted in Iowa. Indeed, the Iowa Administrative Code expressly permits financial institutions which operate ATMs to advertise the terminals "in newspaper, radio, television, or other media. . . . " Iowa Admin. Code r. 187-10.6(3) (1996).

The Court finds that the restrictions of advertising at ATMs, pursuant to Iowa Code § 527.5(5), are not contrary

to the First Amendment. The State has a legitimate interest in maintaining the system of universal access to ATMs, and the advertising restriction is part of the State's strategy to promote and encourage this scheme. Additionally, the restriction itself does not withhold information from consumers, and provides ample alternative means of commercial speech for financial institutions. The statute's effects on the commercial speech of financial institutions in Iowa is, at most, incidental. Accordingly, the Court finds plaintiff is not likely to succeed on the merits of this claim.

7. The Equal Protection Clause

Bank One argues that the in-state office restriction, Iowa Code § 527.4, violates the Equal Protection Clause because it discriminates in favor of in-state financial institutions. The Administrator responds that the restriction does not violate the Equal Protection Clause, as it survives the rational basis scrutiny used to evaluate economic and social legislation.

When legislation impairs fundamental rights, or is drawn upon suspect distinctions such as alienage, race, or religion, the analysis of whether the legislation is valid under the Equal Protection Clause requires heightened scrutiny. *Friedman v. Rogers*, 440 U.S. 1, 17 (1979) (citations omitted). However, economic and social legislation need only have rational basis review to survive an Equal Protection Clause challenge. *Id.* (citations omitted). Under rational basis review, a law need only be reasonably related to a legitimate state interest, permitting a state to make reasonable classifications among persons within its

jurisdiction. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656-657 (1981) (citations omitted); *see also Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 875 (1985) (noting the Equal Protection analysis for economic and social legislation discriminating against foreign corporations is subject to rational basis review) (citations omitted)). "[Under rational basis scrutiny, a law is] entitled to a presumption of validity and will be upheld unless the varying treatment of different groups . . . is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Parham v. Hughes*, 441 U.S. 347, 351 (1979) (citations and internal quotation marks omitted).

The law at issue neither implicates a fundamental right nor discriminates based on a suspect criterion. Therefore, this Court must evaluate the restriction under rational basis review. The Administrator's proffered legitimate purpose of the Iowa EFT Act is consumer protection. Notably, the Iowa legislature set forth as justifications for the Iowa Act:

> 1. That electronic funds transfer systems should provide reliable service to the consumer with full protection of privacy of personal financial information.
>
> 2. That electronic funds transfer systems should not impair the safety and soundness of a person's funds.
>
> 3. That electronic funds transfer systems are essential facilities in the channels of commerce.
>
> 4. That regulation of electronic funds transfer systems should be fair and not unduly impede

> the development of new technologies which benefit the public.

Iowa Code § 527.1.

Under the lenient standard of rational basis review, this Court finds no Equal Protection Clause violation. Consumer protection is undeniably a legitimate purpose. *See Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983). Additionally, the Court finds that the State's purpose is reasonably related to the office restriction set forth in Iowa Code §§ 527.4(1) and (4). Although Bank One characterizes the restriction as geographic, the Court notes that the restriction is actually a branch requirement: a financial institution may not operate an ATM in Iowa unless the institution has a branch office in Iowa. Thus, the distinction is not between out-of-state banks and in-state banks; rather, the distinction is between banks operating a branch in Iowa and those that do not. The Iowa legislature has determined that consumers are better served by an ATM operator with a branch in the state than by an ATM operator without a branch in the state. The Court finds this a legitimate assessment, and consequently finds the restriction is reasonably related to the State's consumer protection purposes. As plaintiff has not overcome the presumption of validity for its Equal Protection claim, the Court finds plaintiff's claim is unlikely to succeed on the merits.

B. The Threat of Irreparable Harm to Plaintiff

Plaintiff makes several arguments regarding the irreparable harm it faces if an injunction is not granted. The Bank argues that the deprivations of constitutional

rights it has suffered is sufficient to support a finding of irreparable harm. This Court has found that Bank One is unlikely to prevail on the merits of its First Amendment, Commerce Clause, and Equal Protection Clause claims, and therefore concludes that Bank One is not suffering irreparable harm as a result of constitutional deprivations.

Bank One also argues that the Administrator's suit against Sears, and the threat that the Administrator may enforce Iowa's ATM laws against Bank One, are causing irreparable harm. The specific harms Bank One argues have resulted from these actions are financial. In particular, the Bank submits that it has been forced to remove several ATMs that it had installed in Iowa. Plaintiff also had to delay plans to install additional ATMs in Iowa. Additionally, the Bank is paying monthly fees to lease and store the ATMs. The Court believes these costs were self-inflicted, and not a result of *defendant's* actions, because Bank One chose to violate Iowa ATM law. *See* Affidavit of Mary Fehring ¶¶ 4-5 (indicating Bank One representative called the Administrator's office in September 1997, inquiring about Iowa ATM law). Bank One, in all likelihood, could have acquired standing to challenge the Iowa ATM law without illegally establishing ATMs.

The most significant harm to Bank One is lost revenue. The Bank notes that it had a plan to deploy ATMs in Iowa, and the Administrator's actions have deprived Bank One of significant revenue each month.[31] The lost

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[31] The Court notes that Bank One is currently able to establish ATMs in Iowa. If Bank One does not wish to establish a

revenue is particularly harmful to Bank One because the Eleventh Amendment would likely prevent the Bank from recovering damages from the State. The Court finds that although this lost revenue is speculative, it may be considered irreparable harm, since the Bank will not be able to recover damages from the State. The Court finds that plaintiff has made a marginal showing of irreparable harm.

C. The Balance of Harms

Iowa's EFT law is carefully crafted to protect consumers who use ATMs. Although Bank One criticizes the Administrator's description of Iowa's EFT law as a consumer protection statute, and characterizes it as a "red herring," the Court believes the Administrator's description is appropriate. Regardless of the merits of Bank One's challenges to the Iowa statutes, the Court believes severe disruption of Iowa's ATM system would result if a preliminary injunction were issued.

Bank One's alleged harm is monetary. If this Court were to enjoin the Administrator from enforcing ATM laws, the harm to Iowa's ATM system could be substantial. Iowa's universally accessible system may be affected, as well as the anti-stacking aspect of Iowa's ATM arrangement. In balancing the financial setbacks incurred by Bank One with the potential harms to Iowa's ATM system, the Court believes the potential harm to the ATM

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local office, the Bank may contract with a local financial institution and establish ATMs. *See* Iowa Code §§ 527.4(3) and 527.5(1).

system is considerably greater than any of Bank One's lost opportunities. Accordingly, the Court finds that this factor weighs in the Administrator's favor.

D. Public Interest

As discussed previously, the Court believes the Iowa ATM system would be disrupted if this Court were to issue a preliminary injunction. For reasons set forth in the previous section, the Court believes this factor falls in favor of the Administrator. Iowa's current ATM law provides consumers with a stable system to which users have nondiscriminatory access. Absent a strong showing that the Iowa ATM system is contrary to federal statutory law or the Constitution, the Court will not disrupt the system, because such a disruption would adversely affect the public interest.

V. CONCLUSION

For the foregoing reasons, defendant's motion to dismiss is DENIED. Additionally, the Court finds three of the *Dataphase* factors strongly weigh against granting a preliminary injunction, and one factor marginally falls in favor of the plaintiff. After considering the balance of equities discussed above, the Court finds that justice does not require Court intervention to alter the status quo of the parties until the merits of this case are determined. Plaintiff's motion for a preliminary injunction is DENIED.

IT IS SO ORDERED.

Dated this 24th day of July, 1998.

/s/ Ronald E. Longstaff
RONALD E. LONGSTAFF., JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 98-3166SIDM

Bank One, Utah, National Association, Appellant, Office of the Comptroller, Intervenor, vs. Michael K. Guttau, etc., Appellee.	*	Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge Loken and Judge Hansen would grant the petition.

The petition for rehearing by the panel is also denied.

Judge Morris Sheppard Arnold took no part in the consideration or decision of this case.

(5128-010199)

November 5, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX EXHIBIT D

CHAPTER 527

ELECTRONIC TRANSFER OF FUNDS

527.1 Statement of intent.

527.2 Definitions.

527.3 Enforcement.

527.4 Establishment of satellite terminals – restrictions.

527.5 Satellite terminal requirements.

527.6 Disclosure of terms. Repealed by 95 Acts, ch 66, §§ 5.

527.7 Records maintained.

527.8 Liability and errors. Repealed by 95 Acts, ch 66, § 5.

527.8A Exemptions.

527.9 Central routing units.

527.10 Confidentiality.

527.11 Rulemaking.

527.12 Revocation of privilege.

527.1 Statement of intent.

The general assembly declares, as its purpose in adopting this chapter to provide:

1. That electronic funds transfer systems should provide reliable service to the consumer with full protection of privacy of personal financial information.

2. That electronic funds transfer systems should not impair the safety and soundness of a person's funds.

3. That electronic funds transfer systems are essential facilities in the channels of commerce.

4. That regulation of electronic funds transfer systems should be fair and not unduly impede the development of new technologies which benefit the public.

527.2 Definitions.

As used in this chapter, the following definitions shall apply unless the context otherwise requires:

1. *"Access device"* means a card, code, or other mechanism, or any combination thereof, that may be used by a customer for the purpose of initiating a transaction by means of a satellite terminal which will affect a customer asset account.

2. *"Administrator"* means and includes the superintendent of banking, the superintendent of savings and loan associations, and the superintendent of credit unions within the department of commerce and the supervisor of industrial loan companies within the office of the superintendent of banking. However, the powers of administration and enforcement of this chapter shall be exercised only as provided in sections 527.3, 527.5, subsection 7,527.11, 527.12, and any other pertinent provision of this chapter.

3. *"Batch basis"* means the delivery of an accumulation of messages representing multiple transactions after completion of the transactions.

4. *"Central routing unit"* means any facility where electronic impulses or other indicia of a transaction originating at a satellite terminal are received and are routed and transmitted to a financial institution, or to a data

processing center, or to another central routing unit, wherever located.

5. *"Completion of the transaction"* means when the presence of the customer at a satellite terminal is no longer needed to consummate the sale of goods or services, to grant to the seller the right to receive payment for the goods or services, and to issue a receipt to the customer.

6. *"Customer asset account"* or *"account"* means a demand deposit, share, checking, savings, or other customer account, other than an occasional or incidental credit balance in a credit plan, which represents a liability of the financial institution which maintains such account at a business location or office located in this state, either directly or indirectly for the benefit of a customer.

7. *"Data processing center"* means a facility, wherever located, at which electronic impulses or other indicia of a transaction originating at a satellite terminal are received and are processed in order to enable the satellite terminal to perform any function for which it is designed. However, *"data processing center"* does not include a facility which is directly connected to a satellite terminal and which performs only the functions of direct transmission of all requested transactions from that terminal to a data processing facility without performing any review of the requested transactions for the purpose of categorizing, separating, or routing. *"Categorizing"* means the process of reviewing and grouping of requested electronic funds transfer transactions according to the source or nature of the requested transaction. *"Separating"* means the process of interpreting and segregating requested electronic

funds transfer transactions, or portions of such transactions, to provide for processing of information relating to such requested transactions or portions of such transactions. *"Routing"* means the process of interpreting and transmitting requested electronic funds transfer transactions to a destination selected at the time of interpretation and transmission from two or more alternative destinations.

8. *"Electronic personal identifier"* means a personal and confidential code or other security mechanism which has been designated by a financial institution issuing an access device to a customer to serve as a supplemental means of access to a customer's account that may be used by the customer in conjunction with an access device for the purpose of initiating a transaction by means of a satellite terminal.

9. *"Financial institution"* means and includes any bank incorporated under the provisions of any state or federal law, any savings and loan association incorporated under the provisions of any state or federal law, any credit union organized under the provisions of any state or federal law, any corporation licensed as an industrial loan company under chapter 536A, and any affiliate of a bank, savings and loan association, credit union, or industrial loan company.

10. *"Limited-function terminal"* means an on-line point-of-sale terminal or an off-line point-of-sale terminal which satisfies the requirements of section 527.4, subsection 3, paragraph *"d"*, or a multiple use terminal, which is not operated in a manner to accept an electronic personal

identifier. Except as otherwise provided, a limited-function terminal shall not be subject to the requirements imposed upon other satellite terminals pursuant to sections 527.4 and 527.5, subsections 1, 2, 3, 7, and 8.

11. *"Multiple use terminal"* means any machine or device to which all of the following are applicable:

a. The machine or device is established and owned or operated by a person who primarily engages in a service, business or enterprise, including but not limited to the retail sale of goods or services, but who is not organized under the laws of this state or under federal law as a bank, savings and loan association, or credit union;

b. The machine or device is used by the person by whom it is owned or operated in some capacity other than as a satellite terminal; and

c. A financial institution proposes to contract or has contracted to utilize that machine or device as a satellite terminal.

12. *"Municipal corporation"* means an incorporated city.

13. *"Office"* means and includes any business location in this state of a financial institution at which is offered the services of accepting deposits, originating loans, and dispensing cash, by financial institution personnel in the office.

14. *"Off-line point-of-sale terminal"* means a satellite terminal that satisfies the requirements of section 527.4, subsection 3, paragraph *"d"* and is other than an on-line point-of-sale terminal.

15. *"On-line point-of-sale terminal"* means a satellite terminal that satisfies the requirements of section 527.4, subsection 3, paragraph *"d"* and is operated on an on-line real time basis.

16. *"On-line real time basis"* means the delivery or return of a message initiated at a satellite terminal through transmission of electronic impulses to or from a location remote from the location of the satellite terminal prior to completion of the transaction.

17. *"Personal terminal"* means and includes a satellite terminal located in a personal residence and a telephone, wherever located, operated by a customer of a financial institution for the purpose of initiating a transaction affecting a noncommercial account of the customer.

18. *"Premises"* means and includes only those locations where, by applicable law, financial institutions are authorized to maintain a principal place of business and other offices for the conduct of their respective businesses; provided that with respect to an industrial loan company, *"premises"* means only a location where business may be conducted under a single license issued to the industrial loan company.

19. *"Reciprocal basis"* means that a financial institution whose licensed or principal place of business is located in this state has the express authority under the laws of a state other than Iowa to conduct business under qualifications and conditions which are no more restrictive than those imposed by the laws of the other state on financial institutions whose licensed or principal place of business is located in the other state, as determined by the administrator, and the laws of Iowa are no more

restrictive of financial institutions whose licensed or principal place of business is located in such other state than they are of financial institutions whose licensed or principal place of business is located in this state.

20. *"Satellite terminal"* means and includes any machine or device located off the premises of a financial institution, and any machine or device located on the premises of a financial institution only if the machine or device is available for use by customers of other financial institutions, whether attended or unattended, by means of which the financial institution and its customers utilizing an access device may engage through either the immediate transmission of electronic impulses to or from the financial institution or the recording of electronic impulses or other indicia of a transaction for delayed transmission to the financial institution, in transactions which affect a customer asset account and which otherwise are specifically permitted by applicable law. However, the term *"satellite terminal"* does not include any such machine or device, wherever located, if that machine or device is not generally accessible to persons other than employees of a financial institution or an affiliate of a financial institution.

527.3 Enforcement.

1. For purposes of this chapter the superintendent of banking only has the power to issue rules applicable to, to accept and approve or disapprove applications or informational statements from, to conduct hearings and revoke any approvals relating to, and to exercise all other supervisory authority created by this chapter with respect to banks; the superintendent of savings and loan

associations only shall have and exercise such powers and authority with respect to savings and loan associations; the superintendent of credit unions only has such powers and authority with respect to credit unions; and the superintendent of banking or the superintendent's designee only has such powers and authority with respect to industrial loan companies.

2. The administrator shall have the authority to examine any person who operates a multiple use terminal, limited-function terminal, or other satellite terminal, and any other device or facility with which such terminal is interconnected, as to any transaction by, with, or involving a financial institution which affects a customer asset account. Information obtained in the course of such an examination shall not be disclosed, except as provided by law.

3. Nothing contained in this chapter shall authorize the administrator to regulate the conduct of business functions or to obtain access to any business records, data, or information of a person who operates a multiple use terminal, except those pertaining to a financial transaction engaged in through a satellite terminal, or as may otherwise be provided by law.

4. Nothing contained in this chapter shall be construed to prohibit or to authorize the administrator to prohibit an operator of a multiple use terminal, other than a financial institution, or an operator of any other device or facility with which such terminal is interconnected, other than a central routing unit or data processing center (as defined in section 527.2) from using those facilities to perform internal proprietary functions,

including the extension of credit pursuant to an open end credit arrangement.

5. An administrator may conduct hearings and exercise any other appropriate authority conferred by this chapter regarding the operation or control of a satellite terminal upon the written request of a person, including but not limited to, a retailer, financial institution, or consumer.

6. The authority of an administrator pursuant to section 527.5, subsection 2, paragraph *"a"*, to approve access cards issued by a financial institution for use as an access device includes the requirement that a registration statement shall be filed with the administrator and be maintained on a current basis by each financial institution issuing access cards within the state. The registration statement shall be in writing on a form prescribed by the administrator, and contain the name and address of the registrant, a depiction of both sides of the access card, and any other information the administrator deems relevant relating to the access card and transactions utilizing the access card which affect a customer asset account.

7. A financial institution shall not be required to join, be a member or shareholder of, or otherwise participate in, any corporation, association, partnership, cooperative, or other enterprise as a condition of the financial institution's utilization of any satellite terminal located within this state.

8. An administrator may issue any order necessary to secure compliance with or prevent a violation of this chapter or the rules adopted pursuant to this chapter, regarding the establishment and operation of a satellite

terminal, limited-function terminal, upgraded, altered, modified, or replaced limited-function terminal, and any other device or facility with which such terminal is interconnected. A person who violates a provision of this chapter or any rule or any order issued pursuant to this chapter is subject to a civil penalty not to exceed one thousand dollars for each day the violation continues. A person aggrieved by an order of an administrator may appeal the order by filing a written notice of appeal with the administrator within thirty days of the issuance of the order. The administrator shall schedule a hearing for the purpose of hearing the arguments of the aggrieved person within thirty days of the filing of the notice of appeal. The provisions of chapter 17A shall apply to all matters related to the appeal. The attorney general, on request of the administrator, shall institute any legal proceedings necessary to obtain compliance with an order of the administrator or to prosecute a person for a violation of the provisions of this chapter or rules adopted pursuant to this chapter.

527.4 Establishment of satellite terminals – restrictions.

1. A satellite terminal shall not be established within this state except by a financial institution whose principal place of business is located in this state, one which has a business location licensed in this state under chapter 536A, or one which has an office located in this state and which meets the requirements of subsection 4.

2. A financial institution whose licensed or principal place of business is located in this state shall not establish a satellite terminal at any location outside of

this state unless the other state provides for the establishment of satellite terminals by Iowa financial institutions on a reciprocal basis.

3. A financial institution whose licensed or principal place of business is located within this state may establish any number of satellite terminals in any of the following locations:

a. Within the boundaries of a municipal corporation if the principal place of business or an office of the financial institution is also located within the boundaries of the municipal corporation.

b. Within the boundaries of an urban complex composed of two or more Iowa municipal corporations each of which is contiguous to or corners upon at least one of the other municipal corporations within the urban complex if the principal place of business or an office of the financial institution is also located in the urban complex.

c. Within the Iowa county in which the financial institution has its principal place of business or an office.

d. At any location in this state off the premises of the financial institution if all of the following apply:

(1) The satellite terminal is not operated to accept deposits or to dispense scrip or other negotiable instruments.

(2) The satellite terminal is not operated to dispense cash except when operated by a person other than the customer initiating the transaction.

(3) The satellite terminal is utilized for the purpose of making payment to the provider of goods or services

purchased or provided at the location of the satellite terminal.

A financial institution shall not establish a satellite terminal at any other location except pursuant to an agreement with a financial institution which is authorized by this subsection to establish a satellite terminal at that location and which will utilize the satellite terminal at that location. This subsection does not amend, modify, or supersede any provision of chapter 524 regulating the number or locations of bank offices of a state or national bank, or authorize the establishment by a financial institution of any offices or other facilities except satellite terminals at locations permitted by this subsection.

4. A financial institution whose licensed or principal place of business is not located in this state may establish, control, maintain, or operate any number of satellite terminals at the locations identified in subsection 3, paragraphs *"a"*, *"b"*, *"c"*, and *"d"* if both of the following apply:

a. The other state provides for the establishment, control, maintenance, or operation of satellite terminals by a financial institution, whose licensed or principal place of business is located in this state, on a reciprocal basis.

b. All satellite terminals, wherever located, that are owned, controlled, maintained, or operated by the financial institution are available for use on a nondiscriminatory basis by any other financial institution which engages in electronic transactions in this state and by all customers who have minimum contact with this state and who have been designated by a financial institution using

the satellite terminal and who have been provided with an access device, approved by the administrator, by which to engage in electronic transactions by means of the satellite terminal.

527.5 Satellite terminal requirements.

A satellite terminal may be utilized by a financial institution to the extent permitted in this chapter only if the satellite terminal is utilized and maintained in compliance with the provisions of this chapter and only if all of the following are complied with:

1. A satellite terminal in this state may be established by one or more financial institutions. The establishing financial institutions shall designate a single controlling financial institution which shall maintain the location, use, and operation of the satellite terminal,wherever located, in compliance with this chapter. The use and operation of a satellite terminal shall be governed by a written agreement between the controlling financial institution and the person controlling the physical location at which the satellite terminal is placed. The written agreement shall specify all of the terms and conditions, including any fees and charges, under which the satellite terminal is placed at that location. If the satellite terminal is a multiple use terminal, the written agreement shall specify, and may limit, the specific types of transactions incidental to the conduct of the business of a financial institution which may be engaged in through that terminal.

2. *a.* A satellite terminal shall be available for use on a nondiscriminatory basis by any other financial institution which has its principal place of business within this

state, and by all customers who have been designated by a financial institution using the satellite terminal and who have been provided with an access device, approved by the administrator, by which to engage in electronic transactions by means of the satellite terminal.

b. For the purposes of complying with paragraph *"a"*, an on-line point-of-sale terminal is not required to be available for use by customers of a financial institution by means of an access device by which an off-line point-of-sale terminal can be used to engage in electronic transactions.

c. All off-line point-of-sale terminals located at the retail location or retail locations within this state of a single retailer are exempt from paragraph *"a"* if electronic transactions can be initiated at each of such terminals only by an access device unique to the retailer.

d. Paragraph *"a"* applies to a financial institution whose licensed or principal place of business is located in a state other than Iowa, whether or not the financial institution has a business location in this state, if all satellite terminals or other similar type terminals owned, controlled, operated, or maintained by the financial institution, wherever located, are available on a reciprocal basis to each financial institution with a principal place of business in this state and to each financial institution with a business location in this state which complies with this paragraph, and to all customers who have been designated by any such financial institution using the satellite terminal and who have been provided with an access device.

3. An informational statement shall be filed and shall be maintained on a current basis with the administrator by the financial institution controlling a satellite terminal in this state, which sets forth all of the following:

a. The name and business address of the controlling financial institution.

b. The location of the satellite terminal.

c. A schedule of the charges which will be required to be paid by a financial institution utilizing the satellite terminal.

d. An agreement with the administrator that the financial institution controlling the satellite terminal will maintain that satellite terminal in compliance with this chapter.

The informational statement shall be accompanied by a copy of the written agreement required by subsection 1. The informational statement also shall be accompanied by a statement or copy of any agreement, whether oral or in writing, between the controlling financial institution and a data processing center or a central routing unit, unless operated by or solely on behalf of the controlling financial institution, by which transactions originating at that terminal will be received.

4. A satellite terminal in this state shall not be attended or operated at any time by an employee of a financial institution or an affiliate of a financial institution, except for the purpose of instructing customers, on a temporary basis, in the use of the satellite terminal, for the purpose of testing the terminal, or for the purpose of transacting business on the employee's own behalf.

5. A satellite terminal in this state shall bear a sign or label identifying each type of financial institution utilizing the terminal. A satellite terminal location in this state shall not be used to advertise individual financial institutions or a group of financial institutions. However, a satellite terminal shall bear a sign or label no larger than three inches by two inches identifying the name, address, and telephone number of the owner of the satellite terminal. The administrator may authorize methods of identification the administrator deems necessary to enable the general public to determine the accessibility of a satellite terminal.

6. The charges required to be paid by any financial institution which utilizes the satellite terminal for transactions involving an access device shall not exceed a prorata portion of the costs, determined in accordance with generally accepted accounting principles, of establishing, operating and maintaining the satellite terminal, plus a reasonable return on these costs to the owner of the satellite terminal.

7. If the administrator deems the informational statement or any amendment to that statement or amendment to be complete and finds no grounds for denying establishment of a satellite terminal, the administrator may notify the person filing the informational statement that the administrator has expressly approved the establishment and operation of the satellite terminal as described in the informational statement or amendment and according to the agreements attached to the statement or amendment. Operation of the satellite terminal may commence immediately upon a person receiving such express approval from the administrator. If the

administrator finds grounds, under any applicable law or rule, for denying establishment of a satellite terminal the administrator shall notify the person filing the informational statement or an amendment thereto, within thirty days of the filing thereof, of the existence of such grounds. If such notification is not given by the administrator, the administrator shall be considered to have expressly approved the establishment and operation of the satellite terminal as described in the informational statement or amendment and according to the agreements attached thereto, and operation of the satellite terminal in accordance therewith may commence on or after the thirtieth day following such filing. However, this subsection shall not be construed to prohibit the administrator from enforcing the provisions of this chapter, nor shall it be construed to constitute a waiver of any prohibition, limitation, or obligation imposed by this chapter.

8. *a.* Satellite terminals located in this state shall be directly connected to either of the following:

(1) A central routing unit approved pursuant to this chapter.

(2) A data processing center which is directly connected to a central routing unit approved pursuant to this chapter.

b. If a data processing center which is directly connected to a satellite terminal located in this state does not authorize or reject a transaction originated at that terminal, the transaction shall be immediately transmitted by the data processing center to a central routing unit approved pursuant to this chapter, unless one of the following applies:

(1) The transaction is not authorized because of a mechanical failure of the data processing center or satellite terminal.

(2) The transaction does not affect a customer asset account held by a financial institution.

c. This subsection does not limit the authority of a data processing center to authorize or reject transactions requested by customers of a financial institution pursuant to an agreement whereby the data processing center authorizes or rejects requested transactions on behalf of the financial institution and provides to the financial institution, on a batch basis and not on an on-line real time basis, information concerning authorized or rejected transactions of customers of the financial institution.

9. A personal terminal may be utilized by a financial institution to the extent permitted by this chapter if the use and operation of the personal terminal is governed by a written agreement between the controlling financial institution and its customer and if the personal terminal is utilized and maintained in compliance with subsection 8 and all other applicable sections of this chapter. A telephone located at other than a personal residence and used primarily as a personal terminal must be utilized and maintained in compliance with this section.

10. Any person, as defined in section 4.1, subsection 20, establishing a limited-function terminal within this state, except for a multiple use terminal, which is utilized to initiate transactions affecting a customer asset account shall file with the administrator and shall maintain on a

current basis a registration statement on a form prescribed by the administrator containing the name and address of the registrant, the location of the limited-function terminal, and any other information the administrator deems relevant. All limited-function terminals established in this state prior to July 1, 1991, shall be registered in a similar manner by the establishing person no later than July 1, 1992.

11. *a.* If at any time, a limited-function terminal at a location as defined in section 527.4, subsection 3, paragraph *"d"*, is replaced by a device constituting either an on-line or an off-line point-of-sale terminal which may be utilized to initiate transactions which affect customer asset accounts through the use of an electronic personal identifier, or is upgraded, altered, or modified to be operated in a manner which allows the use of an electronic personal identifier to initiate transactions which affect customer asset accounts, or an on-line or an off-line point-of-sale terminal which may be utilized to initiate transactions which affect customer asset accounts through the use of an electronic personal identifier is newly established at a location defined in section 527.4, subsection 3, paragraph *"d"*, then such upgraded, altered, or modified limited-function terminal or replacement point-of-sale terminal or such newly established point-of-sale terminal is deemed to be a full-function point-of-sale terminal for purposes of this subsection and all requirements of a satellite terminal in this chapter apply to the full-function point-of-sale terminal with regard to all transactions affecting customer asset accounts which are initiated through the use of an electronic personal identifier, except for section 527.4, subsections 1, 2, and 4,

section 527.4, subsection 3, paragraphs *"a"*, *"b"*, and *"c"*, and subsections 1, 3, and 7 of this section.

b. A full-function point-of-sale terminal, as identified in paragraph *"a"*, which is operated in a manner which permits all access devices to be utilized to initiate transactions which affect customer asset accounts, and where all such transactions can be directly routed for authorization purposes as established in this subsection, is also exempt from the provisions of subsection 8. However, if a data processing center directly connected to such full-function point-of-sale terminal does not authorize or reject a transaction affecting a customer asset account initiated at the terminal through the use of an electronic personal identifier, the transaction shall be immediately transmitted by the data processing center to either of the following:

(1) A central routing unit approved pursuant to this chapter.

(2) An electronic funds transfer processing facility maintained or operated by a national card association and utilized for the processing of transactions initiated through the use of electronic funds transfer transaction cards or access devices depicting a service mark, logo, or trademark associated with the national card association. However, if the national card association's processing facility is unable to immediately authorize or reject a transaction affecting a customer asset account initiated at that terminal through the use of an access device which bears a service mark, logo, or trademark associated with a central routing unit approved pursuant to this chapter but does not bear a service mark, logo, or trademark

associated with a national card association, or which bears a service mark, logo, or trademark other than that associated with either a central routing unit approved pursuant to this chapter or a national card association, the transaction shall be immediately transmitted to a central routing unit approved pursuant to this chapter, whether the transaction initiated through the use of such access device was transmitted to the national card association's processing facility by a data processing center directly connected to the full-function point-of-sale terminal, or the national card association's processing facility received the transmission of transaction data directly from the full-function point-of-sale terminal.

c. If the national card association's electronic funds transfer processing facility directly or indirectly receives a transaction affecting a customer asset account initiated at a full-function point-of-sale terminal through the use of an electronic personal identifier and an access device bearing a service mark, logo, or trademark associated with a national card association, whether or not the access device also bears the service mark, logo, or trademark of an approved central routing unit, and the national card association's processing facility cannot immediately authorize or reject the transaction, such transaction shall be immediately transmitted to a central routing unit approved pursuant to this chapter, or to a financial institution, or its data processing center, which is capable of immediately authorizing or rejecting the transaction.

d. For purposes of this subsection, a national card association must be a membership corporation or organization, wherever incorporated and maintaining a principal place of business, which is engaged in the business of administering for the benefit of the association's members a program involving electronic funds transfer transaction cards or access devices depicting a service mark, logo, or trademark associated with the national card association and which may be utilized to perform transactions at point-of-sale terminals. A national card association must have a membership solely comprised of insured depository financial institutions, organizations directly or indirectly owned or controlled solely by insured depository financial institutions, entities wholly owned by one or more insured depository financial institutions, holding companies having at least two-thirds of their assets consisting of the voting stock of insured depository financial institutions, organizations wholly owned by one or more holding companies having at least two-thirds of their assets consisting of the voting stock of insured depository financial institutions and which are solely engaged in activities related to the programs sponsored by the national card association, or such other entities or organizations which are authorized by the national card association's bylaws to participate in the electronic funds transfer transaction card or access device programs or other services and programs sponsored by the national card association. For purposes of this subsection, a national card association shall not include a financial institution, bank holding company as defined in section 524.1801, or in the federal Bank Holding Company Act of 1956, 12 U.S.C. §§ 1842(d), as amended to July 1, 1994,

association holding company as defined in section 534.102, or a supervised organization as defined in section 534.102, any other financial institution holding company organized under federal or state law, or a subsidiary or affiliate corporation owned or controlled by a financial institution or financial institution holding company, which has authorized a customer or member to engage in satellite terminal transactions. For purposes of this subsection, a national card association shall also not include a membership corporation or organization which is conducting business as a regional or nationwide network of shared electronic funds transfer terminals which do not constitute point-of-sale terminals, and is engaged in satellite terminal transaction services utilizing a common service mark, logo, or trademark to identify such terminal services.

e. This subsection does not apply to satellite terminals located in this state, other than on-line and off-line full-function point-of-sale terminals as identified in this subsection, or multiple use terminals located in this state which are capable of being operated in a manner to initiate transactions affecting customer asset accounts through the use of an electronic personal identifier.

12. Effective July 1, 1994, any transaction engaged in with a retailer through a satellite terminal at a location described in section 527.4, subsection 3, paragraph *"d"*, by means of an access device which results in a debit to a customer asset account shall be cleared and paid at par during the settlement of such transaction. Notwithstanding the terms of any contractual agreement between a retailer or financial institution and a national card association as described in subsection 11, an electronic funds

transfer processing facility of a national card association, a central routing unit approved pursuant to this chapter, or a data processing center, the processing fees and charges for such transactions to the retailer shall be as contractually agreed upon between the retailer and the financial institution which establishes, owns, operates, controls, or processes transactions initiated at the satellite terminal. All accounting documents reflecting such fees and charges imposed on the retailer shall separately identify transactions which have resulted in a debit to a customer asset account and the charges imposed. The provisions of this subsection shall apply to all satellite terminals, including limited-function terminals, full-function point-of-sale terminals as identified in subsection 11, paragraph *"a"*, and multiple use terminals.

527.6 Disclosure of terms. Repealed by 95 Acts, ch 66, § 5.

527.7 Records maintained.

All transactions engaged in through a satellite terminal shall be recorded in a form from which it will be possible to produce a humanly readable record of any transaction, and these recordings shall be retained by the utilizing financial institutions for the periods required by law.

The machine receipt provided to a satellite account transaction card user by a satellite terminal shall be admissible as evidence in any legal action or proceeding

and shall constitute prima facie proof of the transaction evidence by that receipt.

A financial institution shall provide each of its satellite account holders with a periodic account statement that shall contain a brief description of all satellite terminal transactions sufficient to enable the account holder to identify any transaction and to relate it to machine receipts provided by satellite terminals.

When a periodic account statement includes both satellite terminal transactions and other nonsatellite terminal transactions, all satellite terminal transactions shall be indicated as such, and shall be accompanied by the description required by this subsection.

The administrator may provide by rule for the recording and maintenance, by any financial institution utilizing a satellite terminal, of amounts involved in a transaction engaged in through the satellite terminal which are of a known tax consequence to the customer initiating the transaction. For the purpose of this paragraph *"known tax consequences"* means and includes but shall not be limited to the following:

1. An amount directly or indirectly received from a customer and applied to a loan account of the customer which represents interest paid by the customer to the financial institution.

2. In any transaction where the total amount involved is deducted from funds in a customer's account and is simultaneously paid either directly or indirectly by the financial institution to the account of a third party, any portion of the transaction amount which represents a

sales or other tax imposed upon or included within the transaction and collected by that third party from the customer, or any portion of the transaction amount which represents interest paid to the third party by the customer.

3. Any other transaction which the administrator determines to have direct tax consequences to the customer. The administrator also may provide for the periodic distribution to customers of summaries of transactions having known tax consequences.

527.8 Liability and errors. Repealed by 95 Acts, ch 66, § 5.

527.8A Exemptions.

Transactions initiated at a satellite terminal which do not involve the use of an access device to directly or indirectly affect a customer asset account are not governed by this chapter.

527.9 Central routing units.

1. A central routing unit shall not be operated in this state unless written approval for that operation has been obtained from the administrator.

2. A person desiring to operate a central routing unit shall submit to the administrator an application which shall contain all of the following information:

a. The name and business address of the owner of the proposed unit.

b. The name and business address of each data processing center and other central routing unit with which the proposed central routing unit will have direct electronic communication.

c. The location of the proposed central routing unit.

d. A schedule of the charges which will be required to be paid to that applicant by each financial institution which utilizes the proposed central routing unit.

The application shall be accompanied by all agreements between the proposed central routing unit and all data processing centers and other central routing units respecting the transmission of transaction data; and a copy of any agreement between the proposed central routing unit and any financial institution establishing a satellite terminal unless that agreement theretofore has been filed with the administrator pursuant to section 527.5.

e. An agreement by the applicant that the proposed central routing unit will be capable of accepting and routing, and will be operated to accept and route, transmissions of data originating at any satellite terminal located in this state, except limited-function terminals, whether receiving from that terminal or from a data processing center or other central routing unit.

f. A representation and undertaking that the proposed central routing unit is directly connected to every data processing center that is directly connected to a satellite terminal located in this state, and that the proposed central routing unit will provide for direct connection in the future with any data processing center that

becomes directly connected to a satellite terminal located in this state. This representation and undertaking is not required of a central routing unit with respect to limited-function terminals.

3. The administrator shall approve or disapprove an application for operation of a central routing unit within sixty days after receipt.

4. A central routing unit operating under the approval of the administrator shall be subject to examination by the administrator for the purpose of determining compliance with this chapter.

5. *a.* Effective July 1, 1987, a person owning or operating a central routing unit authorized under this section shall include public representation on any board setting policy for the central routing unit. Four or five public members shall be appointed to the board in the following manner:

(1) Two members shall be appointed by the superintendent of banking.

(2) One member shall be appointed by the superintendent of credit unions.

(3) One member shall be appointed by the superintendent of savings and loan associations.

(4) If an industrial loan company is connected to the central routing unit, one member shall be appointed by the superintendent of banking.

b. The superintendent of banking, superintendent of credit unions, and superintendent of savings and loan associations shall form a committee to set, in conjunction

with the entity owning or operating the central routing unit, the term of office, the rate of compensation, and the rate of reimbursement for each public member. However, the public members shall be entitled to reasonable compensation and reimbursement from the board.

c. Each public member is entitled to all the rights of participation and voting as any other member of the board. The public members are to represent the interest of consumers and the business and agricultural communities in establishing policies for the central routing unit.

d. It is the intention of the general assembly that the ratio of public members to the overall membership of the board shall not be less than one public member for each seven members of the board. If the number of members on the board is increased, then the number of members appointed pursuant to paragraph *"a"* shall be increased to maintain the minimum ratio. In this event, a committee composed of the superintendent of banking, the superintendent of credit unions, and the superintendent of savings and loan associations shall appoint additional public members in order to maintain the minimum ratio.

e. An individual shall not be appointed as a public member pursuant to this subsection if the individual is a director of a financial institution or is directly employed by a financial institution doing business in this state.

527.10 Confidentiality.

A satellite terminal, data processing center, or central routing unit shall not be operated in any manner to permit any person to obtain information concerning the account of any person with a financial institution, unless

such information is essential to complete or prevent the completion of a transaction then being engaged in through the use of that facility.

A financial institution, data processing center, central routing unit, or other person shall not disseminate any information relating to the use of a multiple use terminal without the written authorization of the retailer on whose premises the terminal is located, or of the owner or operator of the terminal or the financial institution controlling the terminal. This section shall not, however, prohibit or restrict the use of information received in the processing, authorization, or rejection of a requested electronic funds transfer transaction, where such use is necessary or incidental to the processing, authorization, or rejection, or to reconciling disputes or resolving questions raised by a retailer, financial institution, consumer, or any other person regarding the transaction.

527.11 Rulemaking.

The administrator shall have the power to adopt and promulgate rules pursuant to chapter 17A as in the administrator's opinion will be necessary to properly and effectively carry out and enforce the provisions of this chapter.

527.12 Revocation of privilege.

Whenever the administrator determines, upon notice and hearing pursuant to chapter 17A, that a satellite facility or data processing center or central routing unit is being operated in violation of this chapter, the administrator may revoke the approval to operate that facility. If the administrator does not have any direct authority over

the facility because of the provisions of section 527.3, the administrator may revoke with respect to any financial institution over which the administrator does have direct authority the privilege to engage in transactions through or with that facility. A revocation by the administrator shall be effective when ordered by the administrator, anything in chapter 17A to the contrary notwithstanding. The administrator may bring an action in the district court in the name of the state to enjoin any financial institution or other person who continues to utilize or to operate a satellite terminal or data processing center or central routing unit after the approval has been revoked. The administrator also may bring such an action to enjoin any person who fails to obtain any approval required by this chapter.

Supreme Court, U.S.
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(2)

No. 99-1294

IN THE

Supreme Court of the United States

HOLMES FOSTER, in his official capacity as Superintendent of Banking and Administrator of Electronic Transfer of Funds, Iowa Division of Banking, Iowa Department of Commerce,

Petitioner,

v.

BANK ONE, UTAH, NATIONAL ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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March 2000

QUESTIONS PRESENTED

Whether the court of appeals correctly applied established legal principles governing preemption under the National Bank Act, 12 U.S.C. §§ 21 *et seq.*, to a few specific provisions of Iowa law that impose onerous restrictions on the establishment and operation of Automated Teller Machines ("ATMs") by national banks?

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The parties to the proceeding are correctly named in the caption, with the following exception: The Comptroller of the Currency appeared in both courts below as an *amicus curiae* in support of Bank One, Utah. The Comptroller did not seek to intervene and therefore is not a party to this proceeding.

Bank One, Utah, National Association, is a wholly-owned subsidiary of Bank One Corporation, a Delaware corporation that has issued shares to the public.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

There are multiple reasons for denying the petition. First, the decision of the court of appeals does not conflict with any decision of any other court of appeals or of this Court. To the contrary, the court of appeals applied established legal principles, recently and unanimously reaffirmed by this Court, to a few specific provisions of Iowa law that impose onerous restrictions on the establishment of Automated Teller Machines ("ATMs") by national banks. Second, Iowa's own counsel has characterized that state law provisions that were before the court of appeals as "not . . . important" to the State. C.A. App. 121. Third, Respondent's challenges to other provisions of Iowa law remain pending in the district court following the court of appeals' interlocutory decision. Fourth, the court of appeals' decision is correct. Finally, the provisions of Iowa law that were before the court of appeals are not only preempted by the National Bank Act, but are also invalid on other grounds.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 190 F.3d 844. The opinion of the district court (Pet. App. 17-76) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1999. The court of appeals denied a petition for rehearing on November 5, 1999. Pet. App. 77. The petition for a writ of certiorari was filed on February 2, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

This case arises out of the efforts of Respondent Bank One, Utah, N.A., a national bank that has no branch offices in Iowa, to establish and operate ATMs in that State. Iowa

imposes a variety of onerous restrictions on the operation of ATMs by out-of-state banks. Three particular restrictions were before the court of appeals:

The in-state office requirement. Section 527.4(1) of the Iowa Code provides that "[a] satellite terminal shall not be established within this state except by a financial institution whose principal place of business is located in this state, one which has a business location licensed in this state under chapter 536A, or one which has an office located in this state" and meets certain additional requirements.[1]

The application-and-approval requirement. Iowa Code § 527.5(3) requires any financial institution "controlling a satellite terminal in this state" to file an "informational statement" with the State. The statement must include, among other things, "[a]n agreement with the administrator that the financial institution controlling the satellite terminal will maintain that satellite terminal in compliance with this chapter." Iowa Code § 527.5(3)(d). Under Iowa Code § 527.5(7), the Administrator has 30 days from the submission of a completed application to approve or deny establishment of an ATM. During this 30-day period, the applicant may not begin operating the ATM.

The advertising restriction. Iowa Code § 527.5(5) provides that "[a] satellite terminal location in this state shall not be used to advertise individual financial institutions or a group of financial institutions." The statute requires the operating financial institution to affix "a sign or label no larger than three inches by two inches identifying the name, address, and telephone number of the owner of the satellite

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[1] A "satellite terminal" is defined to include any ATM "located off the premises of a financial institution." Iowa Code § 527.2(20).

terminal." *Id.* The advertising restriction does not apply to ATMs located on the premises on a financial institution.

Respondent's Complaint also challenges certain other restrictions that Iowa imposes on the establishment and operation of ATMs by national banks. Those provisions were not before the court of appeals, and remain pending before the district court.[2]

Respondent entered into agreements with national retailers to operate ATMs in leased space in retail stores throughout the country. During 1997, Bank One, Utah, installed ATMs in 24 retail stores in Iowa, including 11 Sears stores. In December 1997, Petitioner filed suit against Sears (but not Respondent) in Iowa state court, alleging violations of Iowa law in connection with Respondent's ATMs in Iowa Sears stores.

Respondent shut down and removed all its ATMs in Iowa. Respondent then brought this action in federal court, seeking a declaration that Iowa's laws barring Respondent from establishing ATMs in Iowa, and imposing onerous restrictions on the operation of ATMs by national banks, are

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[2] The additional provisions include: (1) Iowa Code § 527.5(6), which regulates the "interchange fee" charged by the owner of an ATM terminal to the financial institution that issued the ATM card used by the customer; (2) Iowa Code § 527.5(2)(a), which requires ATM owners to permit "any other financial institution which has its principal place of business within this state" to use the owner's ATMs, regardless of the existence of any business relationship between the two institutions; (3) Iowa Code § 527.5(8)(a), which requires that all ATMs in Iowa be connected to a "central routing unit" approved under Iowa law; and (4) Iowa Admin. Code § 187-20.4(3)(b)(5), which requires that most ATM transactions be routed through the central routing unit, even if another ATM network could handle the transaction more efficiently. *See* Pet. App. 19-20.

preempted under the National Bank Act and invalid under the Commerce Clause and the First Amendment. Respondent also sought a preliminary injunction to prevent Petitioner from enforcing the challenged provisions during the pendency of the litigation.

The District Court's Order. The district court denied the motion for a preliminary injunction. Pet. App. 17-76. The district court agreed with the Respondent and the Comptroller of the Currency (who appeared as an *amicus curiae* in support of Respondent) that operation of ATMs is within the powers of national banks conferred by the National Bank Act. *Id.* at 23. The court nevertheless held that Respondent was unlikely to prevail on its claims that the challenged provisions of Iowa law are preempted by the National Bank Act. The court concluded that federal law does not authorize national banks to "expand operations" into States in which they do not already have a branch office and, therefore, that the in-state office requirement does not interfere with national banks' power to establish ATMs. *Id.* at 23-24.

The district court also held that Respondent was unlikely to prevail on its constitutional claims. As to the Commerce Clause claim, the court acknowledged that out-of-state national banks are "effectively bar[red]" from satisfying these requirements, but concluded that this "'discriminatory effect' is a result of federal law" rather than state law. *Id.* at 36. As to the First Amendment claim, the District Court recognized that "even a cursory review" of Iowa's advertising restriction shows that it is content-based, *id.* at 41, and that the advertisements the Bank seeks to place are "undisputedly truthful," *id.* at 42. The court nevertheless held that the advertising restriction was narrowly tailored to further the State's interest in preventing consumers from being misled into thinking that they do not have access to a particular ATM. *Id.* at 43.

The Court of Appeals' Decision. The court of appeals reversed. Pet. App. 1-16. The court of appeals noted that "'grants of both enumerated and incidental 'powers' to national banks [are] grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law.'" Pet. App. 7 (quoting *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996)). State regulations are not preempted "when Congress 'accompan[ies] a grant of an explicit power with an explicit statement that the exercise of that power is subject to state law.'" Pet. App. 7 (quoting *Barnett Bank*, 517 U.S. at 33). Noting that Congress has expressly predicated a national bank's power to establish branches upon compliance with state law restrictions on branching, *see* 12 U.S.C. § 36, the court examined whether an ATM is a "branch" within the meaning of Section 36.

The court of appeals explained that in 1996 Congress amended Section 36 to provide: "The term 'branch,' as used in this section, does not include an automated teller machine or a remote service unit." Pet. App. 7 (quoting 12 U.S.C. § 36(j)). The court concluded that this language "clearly expresses Congress's intent" that state law authority with respect to branching by national banks no longer extends to national bank ATMs. *Id.* The court observed that the congressional intent "is made even clearer in light of" judicial decisions prior to the 1996 amendment, which had held that ATMs *were* branches for purposes of Section 36, and therefore were subject to state-law restrictions. Pet. App. 7-8 (citing *Colorado ex rel. State Banking Bd. v. First Nat'l Bank of Ft. Collins*, 540 F.2d 497, 499 (10th Cir. 1976); *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921, 948 (D.C. Cir. 1976); *Independent Bankers Ass'n v. Marine Midland Bank*, 757 F.2d 453, 463 (2d Cir. 1985)). The court of appeals drew additional support for its interpretation from the legislative history of the 1996 amendment, which states: "Section [36(j)] clarifies that an

'ATM' or 'remote service unit' is not considered a 'branch' for purposes of federal bank branching law and is therefore not subject to prior approval requirements or geographic restrictions." Pet. App. 8 (quoting S. Rep. No. 104-185, at 24 (1996)). Finally, the court of appeals noted that the Office of the Comptroller of the Currency ("OCC") has interpreted the National Bank Act as preempting the Iowa provisions of law at issue in this case, and that interpretation "is entitled to great weight." Pet. App. 9 (citing, *inter alia, Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987)). The court of appeals concluded: "Given the clear language of the 1996 amendment, its legislative history and the judicial decisions that formed the backdrop against which it was adopted, and the interpretation of the regulatory body charged with the responsibility of administering the national banking laws," Bank One is not subject to Iowa Code § 527.4(1). Pet. App. 9.

The court of appeals rejected Petitioner's argument that the Federal Electronic Funds Transfer Act, 15 U.S.C. §§ 1693-1693r ("Federal EFT Act"), alters the usual rules of preemption under the National Bank Act. The court explained that the Federal EFT Act "was enacted in 1978 'to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems.'" Pet. App. 11 (quoting 15 U.S.C. § 1693(b)). The court observed that a saving provision in the Federal EFT Act relied upon by Petitioner "is specifically limited to the provisions of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks." Pet. App. 11.

The court of appeals concluded that "in view of our holding on the preemption issue, we need not reach Bank One's remaining [constitutional] challenges to the Iowa statutes." Pet. App. 12.

Judge Bright dissented. Pet. App. 12-16 Although the dissenting judge agreed with the majority that geographic restrictions on the establishment of ATMs no longer apply to national bank as a result of the amendment to 12 U.S.C. § 36, he concluded that other provisions of Iowa law are not geographic restrictions and are not preempted. The dissenting judge viewed the court's decision as contrary to a "principle of competitive equality," under which national banks and state banks "compete on an even footing." Pet. App. 15. The dissenting judge did "not attempt to delineate whether some other restrictions in the Iowa Code are not applicable to national banks," stating that "[t]hose issues may be revisited on further litigation in this case." Pet. App. 16. The dissenting opinion did not discuss Petitioner's argument that the Iowa laws were saved from preemption by the Federal EFT Act. Nor did it consider whether the provisions at issue are invalid under the Commerce Clause or the First Amendment.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION DOES NOT CREATE A CONFLICT.

The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. To the contrary, the court of appeals applied established legal principles, recently and unanimously reaffirmed by this Court, to a few specific provisions of Iowa law – provisions that the State itself has characterized as "not . . . important." C.A. App. 121. In *Barnett Bank v. Nelson*, 517 U.S. 25, 38 (1996), this Court reaffirmed the principle that state laws are generally preempted insofar as they "forbid, or impair significantly" the exercise of powers conferred on national banks by the National Bank Act. Petitioner acknowledges (Pet. 13) that *Barnett Bank* supplies the governing legal standard in this case.

Petitioner suggests in passing (Pet. 8) that the court of appeals' decision conflicts with *Valley Bank of Nevada v. Plus System, Inc.*, 914 F.2d 1186 (9th Cir. 1990). There is nothing even remotely approaching a conflict between *Valley Bank* and the decision in this case. To begin with, *Valley Bank* was not even a preemption case; the issue was whether a Nevada statute violated the Commerce Clause.[3] Moreover, the Nevada law at issue in *Valley Bank* did not impose any restrictions on the operation of ATMs by national banks. Instead, the law *allowed* (but did not require) Nevada banks to impose ATM charges. The single sentence that Petitioner quotes from the *Valley Bank* opinion supports the uncontroversial conclusion that "States have a legitimate interest in regulating banking" for purposes of the Commerce Clause.[4] *Id.* (citing *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980)). The quoted sentence was a reference to Congress's rejection of a proposal to "annul[ ] all State EFT laws." *Id.* (quoting S. Rep. No. 95-915, at 18, *reprinted in* 1978 U.S.C.C.A.N. 9273, 9403, 9420). The court of appeals in this case certainly did not hold that the Federal EFT Act annuls all state EFT laws, but only that the Federal EFT Act did not annul or impliedly repeal provision of the National Bank Act. The court of appeals' decision thus creates no conflict with *Valley Bank*.

Because there is no conflict with the decision in *Valley Bank*, Petitioner errs in asserting (Pet. 11) that the decision in this case creates "uncertainty" in connection with other

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[3] Because *Valley Bank* has very little connection to the issues in this case, it is not surprising that Petitioner did not cite that case in any of its submissions to the court of appeals.

[4] The sentence ("Congress specifically has declined to restrict state regulation in the ATM context.") appears on page 1195 of the Ninth Circuit's opinion not on page 1194 as stated in the Petition.

pending litigation. Moreover, Petitioner fails to disclose that recent lower court decisions on related issues are entirely in accord with the court of appeals' decision in this case. *See First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 1132 (D. Conn. 1999) (holding that the Federal EFT Act is not an affirmative grant of authority to the States to regulate national banks, and that the OCC has exclusive regulatory authority with respect to national banks); *Bank of America v. City and County of San Francisco*, 1999 WL 1243845 (N.D. Cal. Nov. 29, 1999) (holding, on motion for preliminary injunction, that ordinances barring national banks from charging ATM access fees are likely to be preempted), *appeal pending*, Nos. 99-17590, 17591 (9th Cir.); *New Jersey Bankers Ass'n v. Township of Woodbridge*, No. 00-702 (JAG) (D.N.J. Feb. 17, 2000) (entering temporary restraining order with respect to ordinance prohibiting ATM access charges); *First Nat'l Bank of McCook, Neb. v. Fulkerson*, No. 98-D-1024 (D. Colo. Mar. 7, 2000) (holding that Colorado's restrictions on branch banking do not apply to a national bank's operation of a Loan Production Office, Deposit Office, and ATM).

II. THE PETITION OVERSTATES THE IMPORTANCE OF THE COURT OF APPEALS' DECISION.

The court of appeals' decision applies only to the handful of specific provisions of Iowa law that were before it. Moreover, Petitioner's assertions concerning the importance of these provisions to consumers in Iowa and elsewhere (Pet 9-11) contradict his own counsel's representations to the district court. Petitioner's counsel stated that the geographic and advertising restrictions are "not what's important about this case" and "not what's important about [Iowa's] EFT system," but are "ancillary and merely complementary to the basic structure of the system." C.A. App. 121 (Tr. of Hearing before Judge Longstaff). Petitioner's counsel also

stated that the application and approval requirements are so insignificant that "[w]e would be glad in the State of Iowa to not have [national banks] file any papers either. They don't need to file the papers, they just need to go ahead and operate within the confines of our system." *Id.* at 137.

The court of appeals' decision does not leave national bank ATMs in a regulatory vacuum. National banks are fully regulated by the OCC. Indeed, with limited exceptions that are not applicable in this case, Congress has conferred on the OCC *exclusive* authority to enforce both federal banking laws and state banking laws (to the extent the latter are not preempted) with respect to national banks. *See* 12 U.S.C. §§ 484(a), 1813(q)(1); *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 987-89 (3d Cir. 1980); *First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 132, 143-46 (D. Conn. 1999).

III. THE COURT OF APPEALS' DECISION IS INTERLOCUTORY.

This Court usually will decline to "issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order." *American Constr. Co. v. Jacksonville, T. & K. Ry. Co.*, 148 U.S. 372, 384 (1893); *see also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.18, at 195-96 (7th ed. 1993). In this case, Respondent appealed from an interlocutory order of the district court denying a motion for a preliminary injunction. Respondent's appeal was limited to a few specific provisions of Iowa law; Respondent did not appeal from the denial of a preliminary injunction with respect to several other provisions of Iowa law challenged in Respondent's complaint (including Iowa's requirement that ATM transactions be routed through Iowa's monopolistic "Shazam" ATM network, its requirement that all ATMs in Iowa be interconnected to all other ATMs in the State, and its restriction on inter-bank fees for ATM transactions). Those

issues remain pending in the district court following the remand from the court of appeals. Accordingly, this Court should adhere to its usual practice of declining to grant a petition for review "until final decree." *Hamilton-Brown*, 240 U.S. at 258.

IV. THE COURT OF APPEALS' DECISION IS CORRECT.

The court of appeals' decision is well-reasoned and correct. The 1996 amendment to 12 U.S.C. § 36 provides, in clear terms, that national bank ATMs are no longer considered "branches," and therefore are no longer subject to state-law branching restrictions. Prior judicial decisions (which had held that ATMs were subject to state law restrictions precisely because they *were* branches for purposes of § 36), the legislative history of the 1996 amendment, and the views of the Comptroller of the Currency all confirm that the statutory language means what it clearly says: ATMs are no longer deemed to be branches, and are no longer subject to geographical restrictions.

The court of appeals' rulings with respect to the other state law restrictions at issue are straightforward applications of settled law. It has long been established that a state may not require a national bank to apply to and obtain permission from state officials in order to exercise powers conferred by federal law. *See First Nat'l Bank of E. Ark. v. Taylor*, 907 F.2d 775, 780 (8th Cir. 1990) (a State may not bar national banks from exercising their lawful powers "either by direct coercion or through a license requirement"); *Bank of America v. Lima*, 103 F. Supp. 916, 918 (D. Mass. 1952) (the exercise of national bank powers is not subject to approval by state officials). In addition, Iowa's advertising restriction is very similar to the restrictions held preempted by this Court in *Franklin National Bank v. New York*, 347 U.S. 373 (1954), and by the OCC in Interpretive Letter No. 789, [1997

Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-216, at 90,244 (June 27, 1997).

Petitioner is incorrect in asserting (Pet. 13-14) that the court of appeals' decision upsets a "firmly entrenched policy of competitive equality" between national banks and state-chartered banks. That assertion confuses branching with other national bank powers. In enacting 12 U.S.C. § 36, "Congress intended to place national and state banks on a basis of 'competitive equality' *insofar as branch banking was concerned.*" *National Bank of Logan, Utah v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) (emphasis added). In 1996, however, Congress amended § 36 to expressly exclude ATMs from the definition of "branch." 12 U.S.C. § 36(j). Thus Congress, having adopted a "competitive equality" principle for branches, determined that the principle should no longer apply to ATMs.

Outside the realm of § 36 and branching, as the court of appeals correctly recognized, the governing legal principle is that "Congress would not want States to forbid, or impair significantly," the exercise of a national bank power. *Barnett Bank*, 517 U.S. at 33. That principle applies without regard to whether the state law at issue treats national banks less favorably than state-chartered banks. For example, the state law at issue in *Barnett Bank* applied equally to national banks and state banks, but nevertheless was preempted because it interfered with the exercise of a national bank power. *See also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996). Decisions such as *Barnett* and *Smiley* recognize that the National Bank Act was intended to facilitate the creation of "a national banking system." *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978).

Petitioner is also incorrect in asserting that the Federal EFT Act saves the state law provisions at issue from preemption under the National Bank Act. The Federal EFT

Act regulates electronic funds transfers, a broad category of transactions that includes, in addition to ATM transactions, direct deposits and withdrawals and deposits and withdrawals initiated by telephone. The EFT Act imposes limited federal regulation on such transfers by requiring certain disclosures and limiting consumer liability for unauthorized transfers. The court of appeals' decision gives the Federal EFT Act its full force and effect without encroaching on the National Bank Act.

Petitioner bases his argument on a saving provision in the Federal EFT Act, which provides that "*[t]his subchapter* does not annul, alter, or affect the laws of any State relating to electronic funds transfers, except to the extent that those laws are inconsistent with the provisions of *this subchapter*." 15 U.S.C. § 1693q (emphasis added). The court of appeals correctly explained that "this anti-preemption provision is specifically limited to the provisions of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks." Pet. App. 13. *Cf. International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) (saving clause providing that "nothing in this section" preempts state common law does not prevent preemption by other sections of the same statute). No court (and no judge in the courts below) has accepted Petitioner's argument that the Federal EFT Act's saving clause affirmatively grants "open-ended" authority to the States to regulate core banking transactions of national banks, so long as those transactions involve electronic funds transfers. Pet. 16.[5]

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[5] The 1999 amendments to the Federal EFT Act provide a federal statutory penalty if an ATM operator imposes an access fee and fails to provide notice of the fee and an opportunity for the customer to opt out of the transaction. Those amendments contain no grant of authority to the States to regulate ATMs. *See* Gramm-

(...continued)

Finally, the area of disagreement between the majority and the dissenting opinions in this case is relatively narrow. First, the dissenting judge did not accept (or even discuss) Petitioner's main argument, that the Federal EFT Act grants States regulatory authority with respect to national banks. Second, the dissenting judge *agreed* with the majority that the principal state law provision at issue – the restriction on the establishment and operation of ATMs by out-of-state national banks – is preempted. Pet. App. 12-13. Third, the dissenting judge discussed only one subpart of one of the remaining state law provisions at issue, leaving other provisions to "be revisited on further litigation." Pet. App. 16. Fourth, the dissenting judge did not address Respondent's First Amendment and Commerce Clause arguments, which provide an independent ground for invalidating the provisions at issue.

V. IOWA'S RESTRICTIONS ARE INVALID ON OTHER GROUNDS.

The court of appeals agreed with Respondent and the OCC that Iowa's restrictions on the establishment and operation of ATMs are preempted, and therefore the court did not consider Respondent's arguments that those restrictions also violate the Commerce Clause and the First Amendment. Pet. App. 12. Those arguments provide an additional ground for the result reached by the court of appeals.

Iowa's effort to shield its in-state financial institutions from out-of-state competition runs afoul of the Commerce Clause. In *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), the Court invalidated, on Commerce Clause

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Leach-Bliley Act of 1999, Pub. L. No. 106-102, § 7-2, 113 Stat. 1338 (1999) (codified at 15 U.S.C. § 1693b(d)(3)).

grounds, Florida laws that barred banks and bank holding companies whose principal operations were located outside Florida from operating investment subsidiaries or giving investment advice within the State. The Court held that the state laws "discriminate[d] among affected business entities according to the extent of their contacts with the local economy," *id.* at 42 (emphasis omitted), and thus violated "the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." *Id.* at 44 (citations omitted). Iowa Code § 527.4, like the Florida laws struck down in *Lewis*, discriminates among financial institutions according to the extent of their contacts with Iowa, and thereby uses the State's power to protect in-state competitors from out-of-state competition. Accordingly, § 527.4 is invalid under the Commerce Clause.[6]

In addition, Iowa Code § 527.5(5) restricts commercial speech in violation of the First Amendment. As the district court recognized, "[e]ven a cursory review of Iowa Code § 527.5(5) indicates that it is content-based," because the restriction applies only to advertising concerning financial

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[6] The fact that the Iowa law formally applies to both in-state and out-of-state competitors does not save it from invalidity. A state law need not "be drafted explicitly along state lines in order to demonstrate its discriminatory design." *Amerada Hess Corp. v. New Jersey Taxation Div.*, 490 U.S. 66, 76 (1989) (discussing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984)). In-state competitors automatically meet Iowa's in-state office requirement by virtue of their in-state status. Out-of-state national banks cannot meet the requirement (because they are prohibited under Iowa law from establishing de novo branches, and that prohibition is saved from preemption by 12 U.S.C. § 36). A national bank's only options under Iowa law are to merge with an in-state bank or to pay an in-state competitor to "sponsor" it.

institutions, and not to "any other type of advertisement." Pet. App. 66. In addition, the District Court found that

> Bank One does not seek to place false and deceptive advertisements on its ATMs. Indeed, the advertisements Bank One seeks to place are undisputedly truthful, and a motive for placing deceptive information regarding financial institutions on ATMs is difficult to imagine. Thus, the advertisements Bank One seeks to employ constitute the type of commercial speech protected by the First Amendment.

Pet. App. 68. Although Petitioner continues to argue that "too much information can lead to 'information overload,'" Pet. 10, it has long been established that a State may not "keep[ ] the public in ignorance of the entirely lawful terms that [competitors] are offering." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Iowa offered no evidence that its ban on advertising at ATMs is necessary to prevent consumers from becoming confused about whether they have access to ATMs. *See Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (government "seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"). Moreover, the advertising ban does not apply to ATMs located on the premises of branch offices, even though consumers are no less likely to become confused about whether they have access to such ATMs. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-90 (1995) (state restriction unconstitutional where other provisions undermine state's aim). Iowa also failed to demonstrate that the advertising restriction is a "narrowly tailored" response to the problem it has identified. A variety of less restrictive alternatives are open to Iowa, including public education to inform

consumers that they need not be a bank customer to use the bank's ATMs.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

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March 2000

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[7] Iowa's advertising ban is similar to the ban on "For Sale" signs held unconstitutional in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). In *Linmark*, this Court explained that, "[a]lthough in theory sellers remain free to employ a number of different alternatives, . . . [t]he options to which sellers realistically are relegated . . . involve more cost and less autonomy than 'For Sale' signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective media for communicating the message that is to be conveyed by a 'For Sale' sign in front of the house that is to be sold." *Id.* at 93 (citations omitted). For an out-of-state bank such as Respondent, the most effective means of advertising its ATMs and other banking products in Iowa is clearly advertising on the ATM itself.

(3)

No. 99-1294

Supreme Court, U.S.
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In The

Supreme Court of the United States

HOLMES FOSTER, in his official capacity as Superintendent of Banking and Administrator of Electronic Transfer of Funds, Iowa Division of Banking, Iowa Department of Commerce,

Petitioner,

v.

BANK ONE, UTAH, NATIONAL ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE STATES OF MINNESOTA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, KANSAS, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, NEW YORK, NEVADA, NEW MEXICO, NORTH DAKOTA, NORTHERN MARINANA ISLANDS, OKLAHOMA, WASHINGTON, WEST VIRGINIA, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI

The Amici States[1] submit this brief in support of the petition of Holmes Foster, in his official capacity as Superintendent of Banking and Administrator of Electronic Funds, Iowa Division of Banking, Iowa Department of Commerce, for a writ of certiorari. The States have a substantial interest in the vitally important question of whether state laws designed to protect consumers with respect to use of electronic fund transfers ("EFT"), including ATMs, apply to national banks.

There are approximately 227,000 automated teller machines ("ATMs") throughout this country and, on average, each ATM machine conducts 3,985 transactions per month.[2] Although ATMs provide convenience, they also create some significant problems for consumers. Early on, Congress recognized that ATM transactions are "much more vulnerable to fraud, embezzlement, and unauthorized use than the traditional payment methods."[3] Anecdotal evidence suggests that ATM errors are not an infrequent occurrence:

> Among other possible malfunctions, bank notes may be dispensed improperly, deposits may be incorrectly recorded, and terminals may simply

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[1] Alaska, Arizona, Arkansas, Colorado, Connecticut, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Mexico, Nevada, New York, North Dakota, Northern Mariana Islands, Oklahoma, Washington, West Virginia.

[2] John Hall, *ATM Fact Sheet*, American Bankers Association (Nov. 1999).

[3] H.R. Rep. No. 1315, 95th Cong., 2d Sess. 131 (1978).

> "eat" a customer's ATM card, refusing to return it for reasons unknown.

Bank One, Utah v. Guttau, 190 F.3d 844, 851 (8th Cir. 1999) (Bright, J., dissenting).

Policymakers at the state and local levels have contended with a myriad of ATM issues such as how to ensure safety of ATM customers who are conducting financial transactions at off-site, remote locations, accessibility of ATMs to both rural and urban areas, disclosure and privacy issues, and recourse to customers when ATMs malfunction. Since the 1970's, state policymakers have kept pace with the advanced technology and worked assiduously to ensure that consumers' rights were protected. Using their expertise in fashioning consumer protection laws, numerous states have passed EFT legislation that goes beyond the minimal requirements of the federal law.[4]

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[4] *See, e.g.*, Ala. Code § 5-5A-30; Ariz. Rev. Stat. §§ 6-190, 6-475; Cal. Fin. Code §§ 13000-13081; Colo. Rev. Stat. §§ 11-6.5-101-111; Conn. Gen. Stat. §§ 36a-155-159; Fla. Stat. ch. §§ 655.960-.965; Ga. Code Ann. §§ 7-8-1-8; Haw. Rev. Stat. §§ 412:3-506, 508; Ill. Comp. Stat. Ann. 695/5-40; Iowa Code §§ 527.1-527.12; La. Rev. Stat. Ann. §§ 6:1361-6:1367; Md. Code Ann., Fin. Inst. Code 1-401-406; Mich. Stat. Ann. §§ 488.2-.29; Minn. Stat. §§ 47.61-47.74; Miss. Code Ann. §§ 81-5-100, 81-13-62; Mont. Code Ann. §§ 32-6-101-306; Neb. Rev. Stat. § 8-157.01; Nev. Rev. Stat. §§ 660.045-235; N.J. Stat. Ann. §§ 17:16K-1-17:16K-15; N.M. Stat. Ann. §§ 58-16-1-17; N.Y. Banking Law §§ 75a-75o; N.D. Cent. Code § 6-08-31; Or. Rev. Stat. §§ 714.205-714.995; Vt. Stat. Ann. tit. 8, § 510; Va. Code Ann. § 6.1-39.4:1; Wash. Rev. Code Ann. §§ 19.174.010-.090; W. Va. Code § 31A-8-12b; Wyo. Stat. Ann. §§ 13-1-501-502.

The States have a substantial interest in this case to ensure that their existing state EFT laws, some of which have been on the books for over twenty years, remain viable and that the States can continue to explore ways to protect ATM consumers.

SUMMARY OF ARGUMENT

Iowa's petition for a writ of certiorari should be granted for three reasons. First, this case is of enormous public importance. For over twenty years, states have enacted electronic fund transfer ("EFT") consumer protection laws, which directly relate to ATMs, with specific authority from Congress under the Electronic Fund Transfer Act of 1978 ("EFTA"), 15 U.S.C. §§ 1693a-1693r. With one broad stroke, the Eighth Circuit Court of Appeals struck down Iowa's EFT laws as they applied to national banks. The Eighth Circuit stated that:

> Congress has made clear in the NBA its intent that ATMs are not to be subject to state regulation, and thus the provisions of the Iowa EFTA that would prevent or significantly interfere with Bank One's placement and operation of its ATMs must be held to be preempted.

Bank One, Utah v. Guttau, 190 F.3d 844, 850 (8th Cir. 1999). The Court held that based on Congress' elimination of ATMs from the definition of "branch" for the purposes of 12 U.S.C. § 36, national banks were not subject to Iowa's EFT provision, which required an in-state office. *Id.* at 849. While the Court's decision regarding Iowa's in-state office requirement may have limited application to the other states, the Court also held that Iowa's EFT laws,

which prohibited advertisement on ATMs and required off-premise ATMs to have labels with the name, address, and telephone number of the owner, were preempted by the National Bank Act. *Id.* at 850. Thus, by holding that Iowa's advertisement ban and labeling requirements were preempted, the Court has placed other state EFT laws at risk. In addition, the Eighth Circuit's decision will have a chilling effect on state initiatives to protect consumers as national banks have methodically cornered the ATM market in many communities. The Eighth Circuit's opinion will certainly be used by national banks to essentially claim *carte blanche* authority to set up ATMs in our communities without regard for any state consumer protection laws.

Second, the Eighth Circuit's decision contradicts this Court's precedents interpreting the National Bank Act, which requires fair competition between national and state-chartered banks. Instead, the Eighth Circuit's decision gives national banks distinct advantage over state-chartered banks.

Finally, the Eighth Circuit's decision conflicts with *Valley Bank of Nevada v. Plus Sys. Inc.*, 914 F.2d 1186 (9th Cir. 1990), in which the Ninth Circuit upheld a Nevada law that allowed banks to charge ATM transaction fees at a time when the ATM network agreements prohibited the surcharge. In rejecting the ATM networks' Commerce Clause challenge to the law, the Ninth Circuit found that under the EFTA, "Congress specifically has declined to restrict state regulation in the ATM context." *Id.* at 1195.

This Court can provide the needed guidance in defining the role of the states in protecting ATM customers as

Congress intended and ensure that the states retain their traditional powers to enact consumer protection laws within our nation's dual banking system. Moreover, this Court's review is necessary to resolve the conflicting decisions of the Ninth and Eighth Circuit Courts of Appeals.

REASONS FOR GRANTING THE PETITION

I. THIS CASE IS OF EXCEPTIONAL IMPORTANCE TO THE STATES BECAUSE IT ERODES THE STATES' TRADITIONAL POWERS TO PROTECT CONSUMERS AND CONTRADICTS CONGRESS' INTENT TO ALLOW THE STATES TO PROTECT INDIVIDUAL CONSUMER RIGHTS IN ATM BANKING.

The Eighth Circuit's decision contradicts the intent expressly stated in the federal Electronic Fund Transfer Act ("EFTA"), which empowers states to craft stronger ATM consumer protection laws than those contained in the federal law itself. The EFTA was enacted in 1978 in response to *Colorado ex rel. State Banking Bd. v. First Nat'l Bank of Ft. Collins,* 540 F.2d 497, 499 (10th Cir. 1976) (finding state regulation applied because ATM was a branch) and *Indep. Bankers Ass'n of Am. v. Smith,* 534 F.2d 921, 948 (D.C. Cir. 1976) (same)). *See* 16 No. 17 Banking Policy Rep. 8, at *9 (Sept. 1, 1997). Under 12 U.S.C § 36, national banks were subject to state branch banking laws, and thus at a disadvantage in establishing ATMs in states that prohibited branch banking. However, two years after *Colorado ex rel. State Banking Bd.* and *Indep. Bankers Ass'n of America,* Congress passed the EFTA to place national

and state banks on equal footing to establish ATMs throughout the states. *See* 16 No. 17 Banking Policy Rep. 8, at *9 (Sept. 1, 1997). Since 1978, national banks have enjoyed the privilege of establishing ATMs in all states as long as they complied with the EFTA and the respective state's consumer protection regulations.

The EFTA, 15 U.S.C. §§ 1693a-1693r, is the sole federal statute that regulates electronic fund transfers, including ATMs. The EFTA establishes the terms and conditions of electronic fund transactions, documentation requirements, error resolution, consumer liability, and liability of financial institutions. *See* 15 U.S.C. §§ 1693c-1693m. The EFTA applies to all financial institutions using ATMs, including national banks. *See* 15 U.S.C. § 1693a(8).[5]

Congress' primary object in enacting the EFTA was to provide for "individual consumer rights." 15 U.S.C.

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[5] The term "financial institution" is defined as:

> [A] State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person who, directly or indirectly, holds an account belonging to a consumer[.]

15 U.S.C § 1693a(8).

§ 1693(b).[6] While setting the minimum requirements, Congress expressly authorized the states to enact legislation to protect consumers that would provide for more stringent standards. *See generally, Valley Bank of Nevada,* 914 F.2d at 1195 (finding that Nevada's ATM statute promotes a legitimate interest in accord with congressional policy on respecting state banking regulation). Thus, the EFTA specifically contains an anti-preemption provision that gives the states the prerogative to enact legislation to carry out the goals of the EFTA:

> This subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, except to the extent those state laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.

15 U.S.C. § 1693q.

The legislative history of the EFTA also clearly shows that the purpose of section 1693q is to allow the states to enact more stringent consumer safeguards.

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[6] The purpose of the EFTA is provided in the statute:

> It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. *The primary objective of this subchapter, however, is the provision of individual consumer rights.*

15 U.S.C. § 1693(b) (emphasis added).

> While annulling all State EFT laws would produce the benefit of uniform EFT standards in all 50 States, the committee rejected this approach because it would contravene Congress' long-standing policy of deferring to those States which choose to provide more stringent consumer safeguards. Moreover, the committee regards this legislation as setting only minimum national standards.

S. Rep. No. 95-915, 95th Cong., 2d Sess. 18 (1978).

In approaching a new area of technology, Congress relied on the historical and well-established roles of state and federal governments in enacting the EFTA. First, consumer protection is a traditional power of the states. *See California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (states traditionally regulate to "prevent the deception of consumers."). The legislative history of the EFTA reveals that Congress intended that the states should retain their traditional police powers and have an active role in implementing EFT consumer protection laws. *See* S. Rep. No. 95-915, 95th Cong., 2d Sess. 18 (1978).

Second, under our nation's dual system of banking, this Court has determined that national banks are subject to state law, unless state law conflicts with federal law. *See, e.g., Atherton v. FDIC*, 117 S. Ct. 666, 674 (1997) (holding that state's standard of care for negligence applied in an action against officers and directors of a federal savings association); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 247-52 (1944) (state statute administering abandoned deposit accounts did not unlawfully encroach

on the rights and privileges of national banks); *McClellan v. Chipman*, 164 U.S. 347, 358 (1896) (application to national banks of state statute forbidding certain real estate transfers by insolvent transferees would not destroy or hamper national banks' functions); *First Nat'l Bank of Louisville v. Commonwealth of Kentucky*, 76 U.S. 353, 363 (1869) (holding that state's tax on bank shares applied to national bank). This Court has explained that:

> [B]oth as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern . . . [S]ound financial institutions and honest financial practices are essential to the health of any State's economy and to the well-being of its people.

Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 38 (1980).

The EFTA follows the paradigm of the dual banking system in our nation. Congress specifically included the states in addressing the new technology of electronic fund transfers and deferred to the states to use their traditional powers and expertise in creating laws that would address the needs of the individual states, as long as the laws were not inconsistent with the EFTA. After all, while states may share some similar concerns regarding ATMs, states have different ways in manifesting their respective legislative policy. For example, the State of New York has chosen to enact a comprehensive ATM Safety Act to protect ATM customers.[7] It is understandable why Congress rebuked national, uniform standards,

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[7] While the EFTA contains no physical safety requirements surrounding ATMs, the New York law requires banks to provide a surveillance camera to record all persons entering an ATM

and instead, decided to rely on the states to actively participate in ATM regulation and have the states tailor consumer protection measures to meet the respective state's consumer needs.

Contrary to Congress' express intent, the Eighth Circuit Court of Appeals undermines Section 1693q of the EFTA, the provision which Congress intended to provide consumer protection at both federal and state levels. The Eighth Circuit's interpretation of Section 1693q, which the Court found was limited to the EFTA and did not grant states "any additional authority to regulate national banks," has implications beyond the EFTA. *Bank One*, 190 F.3d at 850.

In 1999, Congress enacted the "Gramm-Leach-Bliley Act," which includes privacy laws regulating disclosure of nonpublic personal information in banking.[8] As it did with the EFTA, Congress added an anti-preemption provision that allows states to provide bank customers with greater protection than the federal law.[9] The *Bank One*

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facility, adequate lighting, automatic doors that can only be opened with a customer ATM card, an unobstructed view through one exterior wall, mirrors which permit a person entering an indoor facility to see any areas that might otherwise be concealed, and a sign posting various warnings to customers. N.Y. Banking Law §§ 75-a-75-o (L. 1996, Ch. 9, § 20).

[8] *See* Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, §§ 501-510, 521-527, 113 Stat. 1436 (1999) (codified at 15 U.S.C §§ 6801-6809, 6821-6827).

[9] Section 507, which is headed "RELATION TO STATE LAWS," provides that:

> (b) GREATER PROTECTION UNDER STATE LAW. For purposes of this section, a State statute, regulation, order, or

decision raises the issue of whether Section 507 of the 1999 Act is sufficient to authorize the states to require national banks to comply with states' privacy laws contrary to Congress' clear intent. Thus, the Eighth Circuit's decision not only restricts the states' ability to carry out Congressional intent, but it also severely limits Congress' ability to regulate national banks by relying on the states.

This Court's review is critical to ensure that Congress' intent of allowing states to enact greater protection for bank customers than what is available under federal law, and specifically to provide for "individual consumer rights" under the EFTA, can be carried out by the states.

II. THE EIGHTH CIRCUIT COURT OF APPEALS' DECISION CREATES AN IMBALANCE IN FAVOR OF NATIONAL BANKS TO THE DETRIMENT OF STATE-CHARTERED BANKS.

The National Bank Act ("NBA") has been repeatedly interpreted by this Court to ensure that national banks are allowed to compete on even footing with state banks. *See First Nat'l Bank of Logan, Utah, v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966); *First Nat'l Bank in Plant City, Florida v. Dickinson*, 396 U.S. 122, 131 (1969). The EFTA follows this Court's precedents by placing national and state-chartered banks on equal footing in ATM banking.

> interpretation is not inconsistent with the provisions of this subtitle if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subtitle and the amendments made by this subtitle. . . .

By including both state and national banks within the definition of "financial institutions" under the EFTA, Congress made it clear that both state and national banks are required to comply with consumer protection laws. *See* 15 U.S.C. § 1693a(8). As a result, national and state-chartered banks can fairly compete and consumers are equally protected under the EFTA and the respective state consumer protection laws.

Contrary to this Court's precedents and Congress' intent under the EFTA, the Eighth Circuit interpreted the NBA to give national banks advantage over state-chartered banks by holding that the broad powers granted to national banks under the NBA preempt Iowa's laws prohibiting advertisements on ATMs. *See Bank One*, 190 F.3d at 850. Thus, under the Eighth Circuit's decision, national banks achieve a "distinct and favored position under the law." *Id.* at 852 (Bright, J., dissenting).

The Eighth Circuit's decision has broad implications. Against the express intent of Congress, the Eighth Circuit has sent a clear and strong message to the states to disengage in the enactment of ATM and EFT consumer protection measures. Moreover, the Eighth Circuit's opinion contravenes the long-established tradition of our nation's dual banking system, which embraces both the state and federal governments in the regulation of banks. The balance created by Congress in enacting the EFTA has remained undisturbed for over two decades. This Court's review is necessary to ensure that in this age of fast growing electronic commerce, the balance is not tilted unduly in favor of national banks and to the detriment of the states' ability to protect consumers.

III. THE EIGHTH CIRCUIT'S DECISION THAT THE EFTA PROVIDES NO AUTHORITY TO THE STATES TO REQUIRE NATIONAL BANKS TO COMPLY WITH STATE ATM LAWS CONFLICTS WITH THE NINTH CIRCUIT'S INTERPRETATION OF THE EFTA.

This Court's review is necessary to resolve the conflicting interpretations of state authority under the EFTA between the Eighth Circuit in the instant case and the Ninth Circuit in *Valley Bank of Nevada v. Plus Sys. Inc.*, 914 F.2d 1186 (9th Cir. 1990). *See, e.g., McElroy v. United States*, 455 U.S. 642, 643 (1982) (granting certiorari based on conflict among the circuits on the issue of statutory construction). At issue in the instant case is whether in enacting the EFTA, Congress intended the states to participate in implementing ATM regulations aimed at consumer protection as applied to both national and state banks.

In *Valley Bank of Nevada*, the Ninth Circuit addressed a challenge to Nevada's EFT laws under the Commerce Clause. *See Valley Bank of Nevada*, 914 F.2d at 1189-95. The Ninth Circuit reviewed the legislative history of the EFTA and concluded that Congress "declined to restrict state regulation in the ATM context." *Valley Bank of Nevada*, 914 F.2d at 1195. The Ninth Circuit found it convincing that the legislative history of the EFTA established that a bill proposed to preempt state regulation of shared ATMs never reached the floor. *Id.* Thus, the Ninth Circuit upheld Nevada's statute that prohibited ATM networks from requiring Nevada banks to agree to a no-transaction-fee rule. *Id.* at 1197.

In *Bank One*, however, the Eighth Circuit severely restricts the states' ability to enact ATM legislation by concluding that the EFTA provides no basis for the states to require national banks to comply with state ATM laws. *See Bank One*, 190 F.3d at 850. Therefore, to the extent that the Ninth Circuit determined that Congress' intent under the EFTA was to include states in ATM regulation, while the Eighth Circuit found that the EFTA provides no such authority to the states as applied to national banks, a conflict exists. This Court's review is necessary to resolve the conflict between the two circuits in defining the states' role in implementing ATM regulations under the EFTA.

CONCLUSION

For all the foregoing reasons, the Amici States respectfully request that the petition for a writ of certiorari be granted.

March 2000

Respectfully submitted,

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No. 99-1294

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In The

Supreme Court of the United States

HOLMES FOSTER, in his official capacity as Superintendent of Banking and Administrator of Electronic Transfer of Funds, Iowa Division of Banking, Iowa Department of Commerce,

Petitioner,

v.

BANK ONE, UTAH, NATIONAL ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICI CURIAE BRIEF OF IOWA BANKERS ASSOCIATION, IOWA INDEPENDENT BANKERS ASSOCIATION, IOWA'S COMMUNITY BANKERS, AND IOWA CREDIT UNION LEAGUE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This brief is submitted on behalf of four *amici curiae*: the Iowa Bankers Association; the Iowa Independent Bankers Association; Iowa's Community Bankers; and the Iowa Credit Union League.

The Iowa Bankers Association ("**IBA**") is a non-profit corporation whose 432 members include national banks, state banks, and federally-chartered savings associations of all sizes and comprise in excess of 92% of the banks and savings associations conducting business in Iowa. Its members are both independent and affiliated with holding companies. The IBA provides a variety of services including educational, legislative and other services to its members.

The Iowa Independent Bankers Association ("**IIBA**") is a non-profit corporation with 240 members representing independent, state-chartered and federally-chartered banks operating in Iowa. The IIBA provides educational, legislative and other services to its members.

Iowa's Community Bankers ("**ICB**") is a non-profit corporation with members representing many of Iowa's savings associations. ICB provides educational and legislative services to its members.

The Iowa Credit Union League ("**ICUL**") is a non-profit corporation with 202 members representing 100% percent of the state-chartered and federally-chartered credit unions doing business in Iowa. The ICUL provides educational, legislative and other services to its members.

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[1] Pursuant to Rule 37(6) of the Rules of the Supreme Court of the United States, no counsel for either party had any role in authoring this brief, and no person other than *amici curiae* made any monetary contribution to its preparation or submission. Written consents of the *Petitioner* and the *Respondent* have been obtained and submitted to the Clerk of the Supreme Court of the United States with this brief.

Credit unions, savings associations, state-chartered and federally-chartered banks, and bank holding companies do not always agree regarding regulatory issues. In the matter now before the Supreme Court, however, the *amici* do agree that the action taken by the Iowa Superintendent of Banking to prohibit the deployment of automated teller machines ("**ATMs**") by Bank One, Utah, National Association ("**Bank One**") in Iowa in violation of Iowa's Electronic Transfer of Funds Act, Iowa Code Chapter 527 ("**Chapter 527**") should be supported. Because of their representation of more than 95% of the banks, savings associations and credit unions in Iowa, the *amici* are uniquely qualified to comment on the decision of the Eighth Circuit Court of Appeals both from a legal perspective and a policy perspective.

STATEMENT OF THE CASE

In November, 1996, Congress enacted the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (1996) ("**EGRPRA**"). Section 2205 of EGRPRA amended 12 U.S.C. §36(j) of the National Bank Act ("**NBA**") by deleting ATMs from the definition of branch. As a result, national banks are no longer required to apply to the Office of the Comptroller of the Currency ("**OCC**") for authority to establish ATMs (which by definition include automated loan machines), thereby reducing the OCC regulatory paperwork as intended by EGRPRA.

Based upon EGRPRA, and apparently encouraged by the preemption language in *Barnett Bank v. Nelson*, 517 U.S. 25 (1996), the OCC issued Interpretive Letter No. 772 dated March 6, 1997, and Interpretive Letter No. 821 dated February 17, 1998, in which the OCC concluded that national banks may establish and operate ATMs at any geographic location without regard to state geographic restrictions and related state approval requirements. In 1997, Bank One entered into an agreement with Sears, Roebuck & Co. ("**Sears**") to establish and operate ATM

machines in eleven or more Sears stores and thirteen other locations in Iowa.

In October of 1997, Michael K. Guttau, then Iowa Superintendent of Banking (the "**Superintendent**"), ordered Sears to cease operation regarding the Bank One ATMs. In December of 1997, the Superintendent filed suit in Iowa state court against Sears. As a result of that litigation, Bank One filed a Complaint in the United States District Court for the Southern District of Iowa seeking an injunction to prevent enforcement of Chapter 527 by the Superintendent against Bank One. United States District Court Judge Ronald E. Longstaff denied the request by Bank One for a preliminary injunction (the "**District Court Order**") and Bank One appealed the result as to the following three specific provisions: (i) Geographic restrictions, Iowa Code §527.4(1); (ii) Informational statement and approval by the Superintendent, §527.5(3); and (iii) Advertising restrictions, §527.5(5).

In a decision which includes broad federal preemption language, a three-judge panel of the Eighth Circuit Court of Appeals in a 2-1 decision reversed the District Court Order and directed that the District Court enter a permanent injunction against the Superintendent (the "**Eighth Circuit Order**"). The United States District Court then entered a permanent injunction which enjoins enforcement by the Superintendent of such sections of Chapter 527. The District Court has suspended enforcement of the permanent injunction pending the result of the Superintendent's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The United States Supreme Court should consider granting the Petition For Writ of Certiorari filed by the State of Iowa on behalf of the Superintendent for the following reasons:

I. The Eighth Circuit Order will have a substantial adverse effect on the dual banking system, result in a

competitive advantage for national banks unintended by EGRPRA, permit more expansive interpretations and regulations by the OCC, and provide unwarranted support for national banks in cases pending in other jurisdictions.

II. The Eighth Circuit erred in holding that Chapter 527 is preempted under the tests established by the Supreme Court in *Barnett Bank v. Nelson*, 517 U.S. 25 (1996).

III. The Supreme Court should consider the effect of the federal Electronic Funds Transfer Act, 15 U.S.C. §1691 et seq. ("**EFTA**"), on state regulation of national bank ATMs. The Eighth Circuit erred in holding: (i) that the amendment to the NBA contained in EGRPRA makes clear the intention of Congress that ATMs are not to be subject to state regulation; (ii) that the anti-preemption section of EFTA is specifically limited to the provisions of the EFTA; and (iii) that nothing in EFTA grants the states additional authority to regulate national banks. The holding does not reflect the content or the intent of the EFTA anti-preemption section. 15 U.S.C. §1693q.

IV. The EFTA provides for state enforcement of state laws regulating ATMs.

ARGUMENT

I. THE EIGHTH CIRCUIT ORDER WILL HAVE A SUBSTANTIAL ADVERSE EFFECT UPON IOWA CONSUMERS, COMPETITIVE EQUALITY AMONG FINANCIAL INSTITUTIONS, AND THE DUAL BANKING SYSTEM.

The Eighth Circuit Order discussed all three of the sections of Chapter 527 that were the subject of Bank One's appeal, but concluded only that Bank One's ATMs are not subject to the following restrictions contained in Chapter 527: (i) §527.4(1) relating to a requirement of an in-state office; and (ii) §527.5(5) which prohibits advertising on ATMs and requires disclosure of ownership information. The Eighth Circuit did not reach Bank One's remaining challenges to Chapter 527 in view of its holding on the preemption issue. The Eighth Circuit Order at 190 F.3d at

850, contains the following broad language regarding the preemption of state ATM laws:

> Congress has made clear in the NBA its intent that ATMs are not to be subject to state regulation, and thus the provisions of the Iowa EFTA that would prevent or significantly interfere with Bank One's placement and operation of its ATMs must be held to be preempted.

Bank One elected not to appeal from the District Court Order regarding the following four sections of Iowa law that impose as great or greater consumer protections than the sections of Chapter 527 that were the subject of the appeal:

1. Iowa Code Section 527.5(6), which regulates the fees that may be charged by the owner of an ATM to the financial institution that issued the ATM card used by the customer.
2. Iowa Code Section 527.5(2)(a), the universal access provision which makes ATMs available for use on a nondiscriminatory basis by any other financial institution which has its principal place of business in Iowa, and by all customers to whom a financial institution using the ATM has issued an access card approved by the Superintendent.
3. Iowa Code Section 527.5(8)(a), which requires that all ATMs in Iowa be connected to a "central routing unit" approved pursuant to Chapter 527; and
4. Iowa Admin. Code Section 187-20.4(3)(b)(5), which requires that most ATM transactions be routed through the central routing unit.

Since the District Court Order regarding the above sections were not made part of the appeal and since the District Court Order did not grant the preliminary injunction requested by Bank One, the above sections remain in effect and binding upon Bank One.

If the Eighth Circuit Order becomes final, Bank One or other national banks may consider that, notwithstanding the District Court Order, they may rely upon the broad preemption language of the Eighth Circuit Order and begin, for example, to restrict or limit consumer access to Iowa ATMs in violation of the universal access requirement of Iowa Code Section 527.5(2)(a). The result of such action will be contrary to the District Court Order, detrimental to Iowa state-chartered financial institutions, and Iowa consumers, and may require further time consuming and expensive litigation. The Supreme Court now has the opportunity to bring finality to the issues relating to the applicability of state electronic funds transfer laws to national banks not only in Iowa but in other states as well.

The Eighth Circuit holding on federal preemption is a severe blow to the dual banking system and competitive equality. Judge Bright in his dissent notes that Chapter 527 applies with equal force against both state and national banks, and that "the NBA has been repeatedly interpreted to prevent such competitive imbalances and to insure that national banks are allowed to compete on an even footing with state banks." *See First Nat'l Bank of Logan, Utah v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) ("Congress intended to place national and state banks on a basis of 'competitive equality'. . . . "); *First Nat'l Bank in Plant City, Florida v. Dickinson*, 396 U.S. 122, 131 (1969) (The NBA "respond(s) to the competitive tensions inherent in a dual banking structure . . . [and] reflects the congressional concern that neither system have advantages over the other. . . . "). 190 F.3d at 851.

The effect of the very broad Eighth Circuit holding on the preemption issue and the OCC interpretation of preemption is that state banks remain subject to Chapter 527 while national banks are not. If the holding is permitted to stand, the ultimate results, among others, may be:

- National banks may charge ATM fees to the customers of other banks; state banks may not.
- National banks may establish ATMs anywhere; state banks may not.

- National banks may employ discriminatory ATM consumer access practices; state banks may not.
- National banks may advertise on ATMs and avoid disclosure requirements identifying the name, address and telephone number of the owner of the ATM and the accessibility of the ATM (a consumer protection measure in the event of errors, malfunctions and other problems that consumers may experience in the operation of ATMs); state banks may not.
- National banks may avoid use of a state regulated routing system and state inspection requirements; state banks may not.

The overall result will be a substantial competitive advantage in favor of national banks in the growing area of electronic banking, and a significant weakening of the dual banking system. This, the *amici* submit, is not what Congress intended in EGRPRA and is not what the United States Supreme Court had in mind in the *Plant City* and *Logan* decisions cited above.

The Riegle-Neal Amendments Act of 1997, Pub. L. No. 105-24, 11 Stat. 238, 12 U.S.C. §1 et seq., relates to laws applicable to host state branches of out-of-state national banks and out-of-state state banks.

The legislative history of the Riegle-Neal Amendments Act of 1997 shows Congressional intent to preserve the dual system of regulation of financial institutions. In discussing the Riegle-Neal Amendments Act, Senator D'Amato stated at 143 Cong. Rec. S5637-01 (1997):

> [T]he bill is necessary to preserve confidence in a State banking charter for banks with such a charter that wish to operate in more than one State. In addition, it will curtail incentives for unnecessary federal preemption of State laws. Finally, the bill will restore the balance to the dual banking system by ensuring that neither charter operates at an unfair advantage in this new interstate environment.

In addition, Senator Moseley-Braun proclaimed at 143 Cong. Rec. S5637-01 (1997), the Riegle-Neal Amendments Act ensures:

> [T]he viability of our dual banking system by clearly stating that host State law applies to branches of State-chartered banks only to the extent that it applies to national bank branches. This bill levels the playing field between state-chartered banks and national-chartered banks that branch across state lines. It is important to the preservation of a strong, State-chartered banking system, which benefits the safety and soundness of the banking system as a whole.

Even though ATMs are no longer within the definition of branch in the NBA and, accordingly, national banks may establish ATMs without prior application and approval of the OCC, it is still important that ATMs be regulated in a manner that is consistent for both state and national banks. If EGRPRA is held to preempt state law, the playing field will be significantly tilted in favor of national banks. As a result, national banks will be able to operate ATMs in the state of Iowa without regard to state law, while Iowa financial institutions will remain subject to the restrictions of Chapter 527, precisely the type of result Congress sought to avoid by the Riegle-Neal Amendments Act of 1997.

The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2349 (1994) (the "**Riegle-Neal Act**"), provides that a national bank shall not establish a de novo branch in a state in which the national bank does not have an office unless the state "opts in" to permit de novo branching. Iowa did not opt in and de novo branches are not permitted in Iowa. 12 U.S.C. §36(g)(1).

Recent OCC regulations, based upon its own interpretations and upon the Eighth Circuit Order, provide national banks or operating subsidiaries the authority to establish facilities at any geographic location. Such facilities may: (a) accept deposits through an ATM, make loans

through an ATM, pay withdrawals through an ATM with a telephone or televideo device that allows contact with bank personnel; (b) conduct a deposit production office that may solicit deposits, provide information about deposits, and assist persons in completing application forms and related documents to open a deposit account, staffed by persons who are not employed by the bank; and (c) conduct a loan production office and remote service unit. Any combination of the ATM, loan production office, and deposit production office is not a "branch" within the meaning of 12 U.S.C. §36(j). 12 C.F.R. §7.4403-4405. The new OCC regulations simply permit a national bank to establish a staffed facility that provides generally the same core banking functions (deposits, withdrawals and lending) as a traditional branch, free of state regulation and without formally establishing a de novo branch. Such facilities violate the spirit, if not the letter, of the Riegle-Neal Act and the Iowa law prohibition against de novo branching. Such regulations serve to further reduce competitive equality of state banks and tilt the balance in the dual banking system in favor of national banks.

The *amici* agree with the conclusion of Judge Bright in his dissent in the Eighth Circuit Order:

> Ironically the court's conclusion in this case is at odds with this important principle of competitive equality. State chartered banks remain bound by Iowa's consumer protection laws. To the extent that the court's decision today means that national banks are given a free pass, national banks thereby achieve a distinct and favored position under the law. *Competitive equality this is not.* (emphasis added).

II. THE EIGHTH CIRCUIT ERRED IN FINDING THAT CHAPTER 527 IS PREEMPTED BY THE NATIONAL BANK ACT.

The United States District Court correctly found that Iowa Code Chapter 527, including its enforcement by the

Superintendent, is not preempted by federal statutes or by common law principles of federal preemption.

Prior to 1996, ATMs were included within the definition of "branch" under the NBA. Since ATMs were "branches," ATMs were permitted to be established by national banks only to the extent provided by state law. 12 U.S.C. §36. In 1996, Congress adopted EGRPRA, which amends the definition of branch in the NBA 12 U.S.C. §36(j). Section 2205(a) of EGRPRA provides as follows:

> SEC. 2205. ELIMINATION OF BRANCH APPLICATION REQUIREMENTS FOR AUTOMATIC TELLER MACHINES
>
> (a) "BRANCH" UNDER NATIONAL BANK ACT. – Section 5155(j) of the Revised Statutes of the United States (12 U.S.C. 36(j)) is amended by adding at the end the following: "The term 'branch', as used in this section, does not include an automated teller machine or a remote service unit."

No provision in EGRPRA states that state laws regarding ATMs are preempted, nor does EGRPRA indicate any intention of Congress that state laws be preempted. Section 2205 of EGRPRA appears in Subtitle B entitled "Streamlining Government Regulation" under Chapter 1 entitled "Eliminating Unnecessary Regulatory Requirements and Procedures." The title of Section 2205 of EGRPRA clearly states its purpose: "Elimination of Branch Application Requirements for Automatic Teller Machines." No reference is made as to the effect of Section 2205 of EGRPRA upon state law.

Bank One cited as authority a statement in the legislative history of EGRPRA which suggests that Congress intended that the operation of ATMs by national banks will no longer be "subject to approval or geographic restrictions." S. Rep. No. 104-185, at 24 (1996). If Congress had in fact so intended, Congress would have specifically so stated in EGRPRA.

The principles of federal preemption of state law were recently set forth in *Barnett Bank v. Nelson*, 517 U.S. 25

(1996), wherein the Supreme Court stated that federal preemption is determined by Congressional intent. "Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State? If so, the Supremacy Clause requires courts to follow federal, not state, law." *Id.* at 30. The *Barnett* decision suggests that preemption will occur only in the following circumstances:

> A. Language in the federal statute reveals an "explicit congressional intent" to preempt state law.
>
> B. If no such explicit language appears, "courts must consider whether the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, preemptive intent." Such a preemptive intent may be found in a federal statute which "creates a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."
>
> C. The federal law is in "irreconcilable conflict" with state law in which compliance with both statutes may be a "physical impossibility."
>
> D. A state law may "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

See id. at 31 (letters added for clarification and organization). As set forth below, the preemption tests set forth in *Barnett* are not met with respect to EGRPRA and therefore Chapter 527 is not preempted.

A. *No Explicit Language of Congressional Intent to Preempt Iowa Law.* EGRPRA has no statement of any specific Congressional intent to preempt state law governing ATMs.

B. *Non-Specific Language Does Not Reveal Clear Preemptive Intent.* EGRPRA does not have any nonspecific language that reveals a clear but implicit preemptive

intent. On the contrary, the structure and purpose of EGRPRA is clear in Section 2205: "Elimination of Branch Application Requirements for Automatic Teller Machines." The intent of EGRPRA is to reduce federal paperwork, not to provide expanded powers to national banks so that national banks may operate ATMs free of state law requirements. The purpose of EGRPRA is served by eliminating the need for national banks to make application to the OCC for authority to install ATMs. EGRPRA does not create or provide for any federal regulation so pervasive as to make reasonable the inference that Congress left no room for states to supplement it. Neither NBA, nor the OCC regulations promulgated thereunder, contain any pervasive scheme of federal regulation relating to the use of ATMs by national banks. The only pervasive federal regulation relating to ATMs is found in the EFTA and Federal Reserve Regulation E. 12 C.F.R. pt. 205. As set forth below, neither EFTA nor Regulation E preempt state law.

C. *Federal Law is Not in Irreconcilable Conflict With Iowa Law.* There is no irreconcilable conflict with state law, nor is compliance with Chapter 527 by a national bank a "physical impossibility" within the meaning of *Barnett.* The federal law regarding ATMs is found in the EFTA and Federal Reserve Regulation E. 12 C.F.R. pt. 205. Chapter 527 is not inconsistent with the EFTA or Regulation E and therefore Chapter 527 is not in conflict with federal law. Chapter 527 does not prevent a national bank from establishing ATMs in Iowa. It provides the means by which an out-of-state national bank may arrange, by contract, for the ownership and operation of ATMs in Iowa in compliance with Iowa Code §527.5(1). Chapter 527 is clearly distinguishable from the type of discriminatory statute invalidated in *Lewis v. B. T. Investment Managers, Inc.*, 447 U.S. 27 (1980), as violating the Commerce Clause cited by Bank One. The *Lewis* decision involved Florida statutes that prohibited banks and bank holding companies whose principal operations were outside Florida from operating investment subsidiaries or providing investment advice in

Florida. Chapter 527 strikes a reasonable balance between the "profound local concern", *id.* at 38, that states have for banking and related financial activities, and the Commerce Clause principle of preventing an undue burden on interstate commerce.

D. *Iowa Law Does Not Stand as an Obstacle to Congressional Purposes and Objectives.* Iowa law does not stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress.

The Supreme Court in *Barnett*, 517 U.S. at 34-35, discussed the applicability of state law to national banks:

> But, as we pointed out, *supra*, . . . where Congress has not expressly conditioned the grant of "power" upon a grant of state permission, the Court has ordinarily found that no such condition applies. In *Franklin Nat. Bank*, the Court made this point explicit. It held that Congress did not intend to subject national banks' power to local restrictions, because the federal power-granting statute there in question contained "no indication that Congress [so] intended . . . as it has done *by express language* in several other instances." (citations omitted).
>
> The Federal Statute before us, as in *Franklin Nat. Bank*, explicitly grants a national bank an authorization, permission, or power. And, as in *Franklin Nat. Bank*, it contains no "indication" that Congress intended to subject that power to local restriction. Thus, the Court's discussion in *Franklin Nat. Bank*, the holding of that case, and the other precedent we have cited above, strongly argue for a similar interpretation here – a broad interpretation of the word "may" that does not condition federal permission upon that of the State.

Contrary to the statutes construed in the *Barnett* and *Franklin* decisions, EGRPRA does not explicitly grant a national bank authority to establish and operate ATMs free of state law regulation. In fact, in EFTA, Congress has

specifically recognized the right of states to enact statutes relating to ATMs that require compliance by national banks. Such state laws are enforceable by the states if such laws are not inconsistent with EFTA. *See* 15 U.S.C. §1693q (1978); *see also* 12 C.F.R. §205.12.

Accordingly, the application of the tests set forth by the Supreme Court in *Barnett* does not result in a holding that state laws regarding ATMs are preempted.

III. THE SUPREME COURT SHOULD CONSIDER THE EFFECT OF THE EFTA ON STATE REGULATION OF NATIONAL BANK ATMs.

EFTA was enacted in 1978 "to provide a basic framework establishing the rights, liabilities and responsibilities of participants in electronic fund transfer systems. The primary objective of this Title, however, is the provision of individual consumer rights". 15 U.S.C. §1693(b). A national bank is, by definition, a financial institution subject to EFTA. 15 U.S.C. §1693a(8).

EFTA contains specific sections relating to disclosure of the terms and conditions of electronic fund transfers involving a consumer's account (§1693c); documentation of transfers (§1693d); notice of pre-authorized transfers (§1693e); error resolution procedures (§1693f); consumer liability (§1693g); liability of financial institutions (§1693h); and other specific regulations. In addition, however, EFTA contains a clear anti-preemption section, 15 U.S.C. §1693q, which permits state regulation of electronic fund transfers to the extent the regulation is not inconsistent with EFTA. Section 1693q provides:

> This Subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, except to the extent those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any

> consumer is greater than the protection afforded by this subchapter.

Enforcement of EFTA is, as to national banks, left to the OCC. 15 U.S.C. §1693o(a). It is important to note, however, that a determination of whether or not a state law is inconsistent with EFTA is to be made by the Federal Reserve Board, not the OCC. 15 U.S.C. §1693q. No such determination was requested or made prior to the issuance of the OCC Interpretive Letters or prior to the filing of the Complaint by Bank One.

The Eighth Circuit Order erroneously finds that EFTA does not apply to the establishment of ATM machines by Bank One in Iowa:

> Despite the State's claims, this anti-preemption provision is specifically limited to the provisions of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks. State regulation of national banks is proper where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 116 S.Ct. at 1109. Congress has made clear in the NBA its intent that ATMs are not to be subject to state regulation, and thus the provisions of the Iowa EFTA that would prevent or significantly interfere with Bank One's placement and operation of its ATMs must be held to be preempted.

190 F.3d at 850.

The legislative history of the EFTA clearly suggests that states are allowed to apply more stringent consumer standards than the EFTA requires. The Committee on Bank, Housing and Urban Affairs reported to the United States Senate the following:

> The committee was also impressed with the experience of the $50 liability limit made applicable to credit cards in 1969 by the Truth in Lending Act. This provision has successfully limited consumer liability for lost or stolen credit cards

> while also promoting careful credit card handling and prompt notice of loss by consumers. Based on this experience, as well as favorable data in the seven states (Wisconsin, Iowa, Colorado, Minnesota, Montana, New Mexico, and Kansas) which recently have adopted a similar provision for EFTA, the committee concluded at a $50 liability ceiling was a workable and proven standard.

S. Rep. No. 95-915 at 6 (1978). The Gramm – Leach – Bliley Act of 1999, Pub. L. No. 106-102, §7-2, 113 Stat. 1338 (1999), 15 U.S.C. §1693, contains the ATM Fee Reform Act of 1999 which amends the EFTA by providing a federal statutory penalty if an ATM operator imposes an access fee and fails to provide notice of the fee and an opportunity for the customer to opt out of the transaction. Nothing in the ATM Fee Reform Act affects or modifies the anti-preemption sections of the EFTA which expressly permit states to adopt and enforce state electronic funds transfer laws that provide greater consumer protections than the EFTA.

Based on the legislative history of the EFTA and the anti-preemption section of EFTA, it is clear Congress did not intend to entirely preempt state law regulating electronic fund transfers. Instead, the EFTA and its legislative history expressly provide that states have the authority to enact laws and regulations that afford greater consumer protection than the EFTA. Such state laws will not be deemed as inconsistent with the EFTA. In fact, Congress anticipated such state laws would be enacted. *See* 15 U.S.C. §§1693q-r (1978).

The anti-preemption section of the EFTA is not unique among federal statutes that provide for consumer protection. Similar statutes appear in the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §2616; the Truth in Lending Act, 15 U.S.C. §1666j; the Consumer Leasing Act, 15 U.S.C. §1667(e); the Fair Credit Reporting Act, 15 U.S.C. §1681(t); and the Fair Debt Collection Practices Act, 15 U.S.C. §1692(n). Unless reviewed, the Eighth Circuit Order

may call into question the long recognized rights of states to enact and enforce consumer legislation more protective than the various federal statutes, and to have such state statutes, and their enforcement, remain binding upon national banks.

Iowa Code Chapter 527 provides several consumer protections not covered by the EFTA including:

A. Provisions resulting in a prohibition imposed by the Superintendent against consumer surcharging for ATM transactions. *See* Iowa Code §§527.2-.5 (1999).

B. Universal access which assures that an ATM card issued by any Iowa financial institution will be accepted at any other ATM located in Iowa. *See id.* The state of Iowa has a strong interest in protecting its consumers by assuring universal access to ATM machines at the lowest possible cost. *See* Iowa Code §§527.1(1) and (2) (1999) (stating that electronic fund systems should "provide reliable service to the consumer" and "not impair the safety and soundness of a person's funds").

C. Provisions that require the use of a state approved central routing unit thereby limiting the number of data processing systems through which an ATM transaction must pass, so that the cost of ATM transactions is not increased and transaction reliability is maintained. *See id.*

D. Assurance that consumers will be free of advertising in the use of ATM machines, yet provided essential information regarding the name, address and telephone number of the ATM owner. *See id.*

E. A limitation on transaction fees paid by card-issuing institutions to institutions that establish ATMs. Without such limitation, increased fees may be passed on to consumers. *See id.*

No portion of Chapter 527 is inconsistent with the letter or the spirit of the EFTA which clearly recognizes and gives effect to more restrictive state laws protecting consumers.

The *amici* submit that, upon review, the Supreme Court will agree that in view of the legislative history and anti-preemption language of the EFTA, state regulations which provide more stringent consumer protection that the EFTA are not preempted. To hold otherwise would construe the anti-preemption section of the EFTA from its clear meaning to no meaning.

IV. THE EFTA PROVIDES FOR STATE ENFORCEMENT OF STATE LAWS REGULATING ATMs.

The EFTA applies to "financial institutions" which include state and national banks. 15 U.S.C. §1693a(8). The agencies given administrative enforcement powers under the EFTA are set forth in 15 U.S.C. §1693o. Section 1693o(a)(1)(A) provides, in part, that "*[c]ompliance with the requirements imposed under this subchapter* shall be enforced. . . . in the case of . . . national banks, . . . by the Office of the Comptroller of the Currency." (emphasis added). However, as set forth above, under Section 1693q of the EFTA, state law is to be applied to the extent state law provisions are not inconsistent with the EFTA. The enforcement of Chapter 527, which is more restrictive than the EFTA, is not enforcement of "compliance with the requirements imposed under [the EFTA]." Rather, it is enforcement of Iowa state law by Iowa state authority. Nothing in the EFTA requires that state law be enforced as to national banks by the Office of the Comptroller of the Currency. The Superintendent does not seek to enforce the EFTA. The Superintendent seeks to enforce Chapter 527 as specifically applicable to all financial institutions, which are defined by the EFTA and by Chapter 527 to include national banks. Iowa Code §527.2(9) (1999).

As set forth above, the EFTA specifically recognizes the applicability of state law to electronic fund transactions if such law is not inconsistent with the EFTA. Section 1693q of the EFTA describes the authority of the Board of Governors of the Federal Reserve System, not the OCC, to determine whether state law is inconsistent with the EFTA:

> . . . The Board shall, upon its own motion or upon the request of any financial institution, State, or other interested party, submitted in accordance with procedures prescribed in regulations of the Board, determine whether a State requirement is inconsistent or affords greater protection. If the Board determines that a State requirement is inconsistent, financial institutions shall incur no liability under the law of that State for a good faith failure to comply with that law, notwithstanding that such determination is subsequently amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

By providing the Federal Reserve Board the power to determine whether or not state requirements are inconsistent with the EFTA, Congress has specifically recognized that state laws that are not inconsistent with the EFTA apply to electronic funds transfer transactions. By limiting the power of the OCC to enforcement of only those requirements imposed under the EFTA, Congress has recognized the power of states to enforce state electronic fund transfer laws that provide greater consumer protections than contained in the EFTA.

The Eighth Circuit interpretation of the anti-preemption section of the EFTA is overly restrictive in view of the plain language of section 1693q and the overall purpose of the EFTA as attempting to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. If the Eighth Circuit Order is allowed to stand, the OCC will, in the name of judicial deference, have eliminated the state regulation of electronic transfer fund transactions specifically permitted in the anti-preemption section of the EFTA, and will have usurped the power to determine the extent of the applicability of state law, which Congress specifically reserved to the Federal Reserve Board.

CONCLUSION

Unless reviewed, the Eighth Circuit Order will serve as an overly broad directive to the District Court regarding the portions of the District Court Order from which no appeal was taken. At least one court has already relied upon the Eighth Circuit Order as authority that national bank ATMs are not subject to state regulation and state laws are preempted by federal law. *First Nat'l Bank of McCook, Neb. v. Fulkerson*, No. 98-D-1024 (D. Colo. March 7, 2000). In addition, the Eighth Circuit Order will continue to be a beacon for cases now pending in other states as well as potential future litigation. The Eighth Circuit Order sends the wrong signal: It supports unwarranted federal preemption; it renders meaningless the anti-preemption section of EFTA; it fails to recognize the intent of Congress that states have the right to impose and enforce laws and regulations that provide for greater consumer protections than that mandated by the EFTA; and it provides national banks a substantially favored position in contravention of competitive equality with state-chartered banks and thereby impairs the dual banking system.

For the foregoing reasons, as well as those urged by the Superintendent, the *amici* request that the Supreme Court grant the Superintendent's Petition For a Writ of Certiorari.

Respectfully submitted,

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